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# In the Supreme Court of the United States

**OCTOBER TERM, 1988**

WALLACE ROGERS, SOUTHEAST KANSAS COMMUNITY ACTION PROGRAM, INC., AND THE ECONOMIC OPPORTUNITY FOUNDATION,
*Petitioners,*

vs.

THE UNITED STATES,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WILLIAM E. METCALF
Counsel of Record
JO LYNNE JUSTUS
METCALF AND JUSTUS
3601 SW 29th, Suite 207
P.O. Box 2184
Topeka, Kansas 66601
(913) 273-9904
*Attorneys for Petitioners Wallace Rogers, Southeast Kansas Community Action Program, Inc., and the Economic Opportunity Foundation*

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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## QUESTIONS PRESENTED

The questions presented are:

1. Where the following facts occurred:

a. Petitioners Southeast Kansas Community Action Program, Inc. and the Economic Opportunity Foundation brought an action for declaratory and injunctive relief in the United States District Court on due process equal protection grounds and statutory grounds against federal officials;

b. Petitioner Rogers brought an action on racial discrimination grounds because Respondent did not provide Petitioners Southeast Kansas Community Action Program, Inc. and the Economic Opportunity Foundation with a second installment of funding due under existing grants;

c. The Tenth Circuit Court of Appeals transferred the case to the United States Claims Court pursuant to 28 U.S.C. 1631 on the basis that the essential nature of the case was to compel the payment of money by the United States;

d. The Claims Court dismissed Petitioners Southeast Kansas Community Action Program, Inc.'s and the Economic Opportunity Foundation's due process and equal protection claims and Petitioner Rogers' claims for lack of jurisdiction;

Was the Claims Court required to hear and determine Petitioners' constitutional due process and racial discrimination claims or, in the alternative, was it required to transfer such claims back to the United States District Court pursuant to 28 U.S.C. 1631?

2. Did the actions of the United States, through its agency the Community Services Administration, violate the following:

a. Statutory requirements that funds be distributed on an equitable basis;

b. The constitutional requirements of equal protection and due process;

c. The statutory requirement that funds be distributed on a basis of legitimate project concerns;

d. The Administrative Procedure Act's prohibition against arbitrary and capricious acts?

3. Did the Tenth Circuit Court of Appeals properly transfer this case to the United States Claims Court pursuant to 28 U.S.C. 1631?

4. Did the Community Services Administration violate Petitioners' rights by implementing a policy which was never published in the Federal Register as required by 42 U.S.C. 2971(b)?

## PARTIES TO THE PROCEEDING

All parties to the proceeding in the United States Court of Appeals for the Federal Circuit are the same as those listed in the caption of the case in this Court. However, this case began as a case against Dwight Ink, Administrator of the Community Services Administration, and David Stockman, Director of the Office of Management and Budget, in the United States District Court for the District of Kansas. Therefore, these individuals and their successors in office are also parties to this appeal.

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*Petitioners,*

vs.

THE UNITED STATES,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Petitioners, Southeast Kansas Community Action Program, Wallace Rogers and the Economic Opportunity Foundation respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on September 28, 1988.

## OPINIONS BELOW

There is no official or unofficial report of the opinion of the United States Court of Appeals for the Federal Circuit. (See Appendix A.) However, the Court of Claims' decision herein is published at 14 Cl.Ct. 39 (1987).

(See Appendix B.) Also, this case began as a case for injunctive and declaratory relief in the United States District Court for the District of Kansas. The case was dismissed by the United States District Court and no published opinion was made. However, the opinion of the Tenth Circuit Court of Appeals, holding that the United States District Court for the District of Kansas lacks jurisdiction to entertain the suit and ordering the case transferred to the United States Claims Court, is found under the caption *Rogers v. Ink*, 766 F.2d 430 (10th Cir. 1985). (See Appendix C.)

## JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its judgment in this case on September 28, 1988. Jurisdiction is in this Court pursuant to 28 U.S.C. 1254.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises from the 5th Amendment to the United States Constitution, which states as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation."

The jurisdictional question presented by this case involves the following statutes:

a. 28 U.S.C. 1491, which states as follows:

"(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Forces Exchange Service, Navy Exchanges, Marine Corps Exchange, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render

judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(4) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority."

b. 28 U.S.C. 1331 which states as follows:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The transfer of this case from the district court to the United States Claims Court was authorized by 28 U.S.C. 1631, which states as follows:

"Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court

shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred."

This case also involves the following statutes and regulations, which are reproduced in the Appendix as follows:

a. 42 U.S.C. 2808, Appendix D.

b. 42 U.S.C. 2833(b), Appendix E.

c. 42 U.S.C. 2836(8), Appendix F.

d. 42 U.S.C. 2944, Appendix G.

e. 42 U.S.C. 2967, Appendix H.

f. 42 U.S.C. 2971(b), Appendix I.

g. Pub.L. 97-51, Sec. 133, Appendix J.

h. 42 U.S.C. 9911(e), Appendix K.

i. 45 C.F.R. 1067.2, Appendix L.

j. 45 C.F.R. 1067.30-5(8), Appendix M.

k. 42 U.S.C. 2000(d), Appendix N.

## STATEMENT OF THE CASE

Petitioners Southeast Kansas Community Action Program, Inc. ("SEK-CAP") and Economic Opportunity Foundation, Inc. ("EOF") are two Community Action Agencies ("CAAs"). Petitioner Wallace Rogers is a black

citizen of Kansas who was served by and received benefits from SEK-CAP under SEK-CAP's federally funded programs.

From the founding of the Community Services Administration's ("CSA") predecessor, Office of Economic Opportunity ("OEO"), until and including 1974, CAAs were given staggered, one year grants which were renewed each year. In this way, CSA could spread out the workload involved in re-funding grantees. For example, in 1973, a CAA such as SEK-CAP, with a program year beginning on June 1, 1973, would have received funding for its full program year from Federal Fiscal Year ("FFY") 1973 funds. Another grantee might have a May 1 program year beginning date.

In 1974, Congress failed to approve the full amount of CSA appropriations required to re-fund all the CAAs. Instead, Congress cut the amount of Section 221 (42 U.S.C. Sec. 2808, see Appendix D.) funds by approximately $100 million—a 40% reduction.[1]

To cope with its lowered FFY 1974 appropriations, CSA decided to de-stagger CAA funding; i.e., to give funding to each CAA only to the end of the FFY rather than for the full program year ordinarily authorized. Accordingly, a CAA, such as SEK-CAP, with a program

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1. See, Hearings, Department of Labor and Health, Education and Welfare, and related Agencies Appropriations for Fiscal Year 1974, U.S. Senate, 93rd Cong., 1st Sess. 3888, 3892-3893, 3897 (1973) (statements of Alvin Arnett, Director-Designate, OEO and Richard Redenius, Comptroller, OEO); Department of Labor and Health, Education and Welfare Appropriation Act, 1974, Pub.L. No. 93-192, Title III, 78 Stat. 508 (1974); Hearing Before a Subcommittee of the Committee on Government Operations, House of Representatives, 94th Cong., 1st Sess. 145 (1975) (statement of Thomas Rollis, Comptroller, Community Services Administration).

year which began on June 1 received only 1 month funding to bring it to the end of the FFY (June 30, 1974), rather than to the end of its normal program year (May 31, 1975). On the other hand, the CAAs with program years beginning July 1 (the beginning of the FFY at that time) received a full year's funds at the prior year's rate.

The savings realized by de-staggered funding (i.e., less than a full year for many CAAs) enabled CSA to sustain individual CAA programs at the pre-reduction FFY 1973 monthly levels. Accordingly, although the CAA appropriation was reduced 40%, there was no commensurate reduction in monthly funding for any CAA. Of course, CSA's method of staggering CAA program years was effectively abolished through this approach. Each CAA wound up with its program expiring, and having to be renewed, on the same date—July 1. In turn, this meant that CSA's administrative workload was concentrated around a single date, causing CSA severe administrative problems.[2]

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2. This change in the funding cycle was explained to a Congressional subcommittee in 1974, by CSA's comptroller Thomas Rollis, as follows:

> "The disagreement between Congress and the administration over the future of OEO resulted in a compromise appropriation in 1974 of $185 million. Our normal level on the basis of local initiatives of programs is $330 million annually. That's $27.5 million a month. The Congress appropriated half the yearly requirement, $185 million, and authorized us to fund all our grantees through June 30, 1974, which we did. Consequently, even though our outlay level of $27.5 million per month hasn't changed in the last few years, we were shortened to the point that all our grantees come due on the first day of the fiscal year."

Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, 94th Cong., 1st Sess. 145 (1975) (statement of Thomas Rollis, Comptroller, Community Services Administration).

In 1975, the ending date of the FFY was changed from June 30 to September 30, requiring CAA program extensions to the end of the new FFY. CSA used this opportunity, together with supplemental appropriations, to re-stagger the program years of about 75% of the CAAs—those with Sec. 221 funding of less than $300,000.00 per year ("small CAAs"). Small CAAs were returned to annual funding. For example, a small CAA with a program year beginning on June 1, 1976, would receive a full twelve months of funding for that program year, from FFY 1976 funds.

CAAs with more than $300,000.00 of Sec. 221 funding ("large CAAs") were returned to their previous program years. However, large CAAs were not returned to annual funding. Instead, they received their funding in two installments. The first installment would be received at the time of application approval and would be for the number of months up to the end of the FFY. The second installment would be received either just before or just after the end of the FFY and would be for the number of months from the end of the FFY until the beginning of the CAA's next program year.

For example, a large CAA such as SEK-CAP, with a program year beginning on June 1, 1976, would receive a four month installment of funding from FFY 1976 funds to take it from June 1 until September 30, 1976. Either just before or just after October 1, it would receive an eight month installment of funds to take it from October 1 until May 31. If this second installment was issued before October 1, it would obligate FFY 1977 funds.

This disparity in treatment between large and small CAAs was a policy of CSA which was never published in the Federal Register as required by 42 U.S.C. 2971(b). (See Appendix I.)

Since the entire application had been approved before the first installment had been issued, no new review of the program was conducted. Once a large CAA had received approval of its application, and a grant for the first portion of its program year, it had a legitimate expectation that, unless it violated the terms and conditions of that grant or funds were not available, it would receive funding for the remainder of its program year. Failure to issue a grant for that funding constituted a termination of assistance (rather than a denial of re-funding) and before such action became effective, the grantee was required to be given reasonable notice and an opportunity for a full and fair hearing. (42 U.S.C. 2944, Appendix G.) The grantee would continue to receive funding pending the hearing. This created a legitimate claim of entitlement to the second installment of funding subject to due process protection. *Board of Regents v. Roth,* 408 U.S. 564 (1972).

The United States conceded and the Claims Court found that the action of the United States in approving the grant application also created an implied-in-fact contract between the parties which mandated the payment of the second installment of funding unless the terms and conditions of the grant were breached or no funds were available. In this case, it has not been alleged that EOF or SEK-CAP breached any grant condition.

It is important to recognize that there was no consistent "historical pattern" that large CAAs received this

second installment of funds from the next FFY (i.e., the FFY during which the CAA's program year ended). On the contrary, for example, EOF received FFY 1980 funds for *both* installments of funds for its program year ending in 1981. Similarly, SEK-CAP received FFY 1980 funds for both installments for its program year ending May 30, 1981. It received FFY 1979 funds for both installments of funding for its program year ending May 31, 1980. Similarly, Wichita—the third large CAA in Kansas —also received FFY 1980 funds for both installments of funding for its program year ending in 1981. Thus, all three of the large CAAs in Kansas received their full program year of funding from the FFY *before* the one in which their program years ended.

If this pattern had been followed in FFY 1981, Petitioner CAAs would have received full funding for their program years ending in FFY 1982, from FFY 1981 funds —*exactly the result which Petitioner CAAs request.*

Moreover, it has been conceded by the United States that the policy of funding large CAAs on a time installment basis while funding small CAAs on a yearly basis lost its significance by 1981. Thus, if a small CAA became a large CAA due to an increase in funding, it was still funded on a one installment basis. If a new CAA was created as the result of closing a large CAA, it might be treated as a small CAA and funded on a single installment. Also, some large CAAs were moved from split funding to single installment funding. In other words, there was no rational basis for treating one CAA differently from another by FFY 1981. There were so many exceptions there was no rule. Further, the differences between funding patterns resulted from circum-

stances which were particular to individual CAAs (size of grant, regional affiliation, etc.) and not the result of any generally applied policy.

In 1981, Congress passed the Omnibus Budget Reconciliation Act of 1981 (the "Reconciliation Act"). Congress did not reduce FFY 1981 Section 221 funding, nor did it direct that those funds be used for other than Section 221 purposes. While Congress did authorize the Director of the Office of Management and Budget ("OMB") to provide for transfer of certain balances if they were not expended (Reconciliation Act Sec. 682(e), 42 U.S.C. 9911(e), Appendix K) it did *not* authorize the Director *of CSA* to disregard his statutory obligation to expend FFY 1981 Sec. 221 funds for the purposes prescribed by the Economic Opportunity Act. It did not repeal the restrictions on the Director of CSA regarding the allocation or use of those funds. (See 42 U.S.C. 2833(b), Appendix E, 42 U.S.C. 2836(8), Appendix F, and 42 U.S.C. 2967, Appendix H.) Instead, it provided that the funds appropriated *for FFY 1982,* and later FFY's would be distributed in a new way. Those funds would not be administered by CSA (in fact, CSA would be abolished), but rather by the states under a Block Grant program to be funded under the Department of Health and Human Services ("HHS"). The federal government would distribute FFY 1982 funds to the states rather than to individual CAAs. The states would then distribute the funds. Large and small CAAs were equally eligible to receive grants from FFY 1982 funds allocated to the state under the Block Grant program. FFY 1982 funds for CSA close-out expenses was provided by Section 133 of Public Law 97-51 (95 Stat. 967, October 1, 1981), which stated that "such sums as may be neces-

sary shall be available during fiscal year 1982 for close-out expenses of the Community Services Administration".

Before the passage of the Reconciliation Act, CSA nationally and Region 7 (the region covering Kansas) continued to fund all small CAAs by a single grant from FFY 1981 funds for their full program year, including any part of that program year extending into FFY 1982. In most cases, large CAAs were only issued grants for that portion of their program year up to September 30, 1981—the end of FFY 1981.

Once the Reconciliation Act was passed in August of 1981, CSA provided full program year funding from FFY 1981 funds to a large number of CAAs. In many cases, full 12 month funding was granted to CAAs for program years beginning on October 1, 1981. Also, after August 13, 1981, some large CAAs were funded well into FFY 1982.

Even with funding all small CAAs in Region 7, there remained unobligated FFY 1981 Section 221 funds in the region in the approximate amount of $1.4 million. In other Regions where such surplus funds existed, the Regional Director was permitted to exercise his discretion to use those funds to provide additional funding to large CAAs to cover at least part of that portion of their program year which extended into FFY 1982. The Regional Director of Region 7 twice requested permission to take the same action in Region 7 and was twice denied permission to do so. Instead, CSA recalled all funds which otherwise would have been available for grants to the large CAAs.

The funds were recalled for two primary reasons. First, such unused money was transferred to the admin-

istrative account to pay annual leave and termination benefits for CSA employees. Second, CSA Director Dwight Ink wished to use these funds as "a cushion for the anti-deficiency act". However, on September 30, 1986, about $8 million dollars of CSA money was allowed to lapse to the U.S. Treasury.

For their respective 1981 program years, SEK-CAP and EOF each received funding guidance letters soliciting 12 month applications for refunding from the CSA Regional Office several months before the beginning of their program year, June 1, 1981 and April 1, 1981, respectively. Each agency submitted its proposal, as requested, for a full 12 month program year. These 12 month applications were approved by the Regional Director, Wayne Thomas. As per the commonly understood policy regarding the funding of large CAAs, SEK-CAP and EOF were each issued an installment of funding covering that portion of their approved 12 month program between the beginning date of their program year and the end of the FFY, September 30, 1981. In light of national policy and past experience, the action of the CSA Regional Office in issuing the first installment of funds, and in not denying the application for refunding, indicated that the full 12 month refunding had been approved. This was mutually understood by SEK-CAP, EOF and by the Regional Director, Wayne Thomas. It was further understood by the Regional Director of CSA, Wayne Thomas, that the second installment of funding could not be withheld without a full and fair hearing pursuant to 42 U.S.C. 2944(3). (See Appendix G.)

Based on this understanding of the actions of the CSA Regional Director, based on the fact that their applications

had been approved, and based on the fact that the second installment had been promised to be paid, SEK-CAP and EOF did not take action against the Regional Director on the basis that the application for refunding had been denied (42 U.S.C. 2944(2), Appendix G), or on the basis that 45 C.F.R. 1067.30-5(8) required that they be refunded for a full 12 month program year whenever possible. (See Appendix M.)

SEK-CAP and EOF on one hand, and the CSA Regional Office on the other, were acting under their mutual understanding of the refunding transaction until late September, 1981, but it became apparent that the second installment of funding would not be forthcoming. Thus, this action was brought in the United States District Court for the District of Kansas on September 30, 1981, pursuant to 28 U.S.C. 1331 requesting declaratory and injunctive relief. On August 24, 1982, the District Court dismissed the case. The case was timely appealed to the Tenth Circuit Court of Appeals. The Tenth Circuit Court of Appeals vacated the dismissal and ordered the case transferred to the Claims Court pursuant to 28 U.S.C. 1631. *Rogers v. Ink,* 766 F.2d 430 (10th Cir. 1985). (Appendix C.)

The transfer also included the case of Wallace Rogers, a black, low-income resident, whose claim was that the funding pattern adopted by the Respondent discriminated against black Americans and therefore denied him equal protection guaranteed by the 5th Amendment to the United States Constitution and was a violation of 42 U.S.C. 2000 (d). (See Appendix N.)

The Petitioners' amended complaint was timely filed in the Claims Court pursuant to 28 U.S.C. 1491. Subsequently, after completion of discovery, Petitioners SEK-CAP and EOF filed a motion for summary judgment.

Petitioner Rogers' claim was based on racial discrimination and he did not join the motion. In response, the United States filed its own partial motion for summary judgment and a motion to dismiss Petitioners' constitutional and racial discrimination claims based on lack of jurisdiction.

The Claims Court granted summary judgment for the United States and dismissed the racial discrimination and constitutional claims. (See Appendix B.) The Claims Court concluded that CSA's approval of Petitioners' grant application created an express and implied-in-fact contract, but that Respondent did not breach such contract by failing to issue the Petitioners' remaining amounts due under the grant. The Claims Court specifically considered and decided that the defendant did not engage in arbitrary and capricious decision making in violation of the Administrative Procedure Act. The court held that the Respondent was not required to provide a reason for denial of funding as required by 42 U.S.C. 2944. The court also found that the Respondent was not required to afford Petitioners the opportunity for a full and fair hearing as required by 42 U.S.C. 2944. The court found also that in distributing FFY 1981 funds, the Respondent did not violate statutory and regulatory provisions requiring the equitable distribution of funds as required by 42 U.S.C. 2833(b), 2836(8), and 2967. (See Appendix E, F and H.) The court also found that the Respondent did comply with the requirements of 45 C.F.R. 1067.30-5(8) that whenever possible, grantees be funded for the entire program year. The court held it did not have jurisdiction to determine if the defendant violated Petitioners' due process and equal protection rights in violation of the 5th Amendment to the United States Constitution. Also, the court held that

it did not have jurisdiction to adjudicate Petitioner Rogers' complaint pursuant to 42 U.S.C. 2000(d) and the 5th Amendment that no person should be denied benefits under a federal program on account of race.

The case was then appealed to the Federal Circuit Court of Appeals, which affirmed the Claims Court. The opinion is short and basically holds that the Claims Court convincingly explained that CSA acted in all respects within its discretion in accordance with the law. It also held that the court was correct in its determination that it had no jurisdiction over the due process, equal protection and discrimination complaints of the Petitioners. (See Appendix A.)

## REASONS FOR ALLOWING THE WRIT

This case embodies an inherent conflict of decisions between the Federal Circuit Court of Appeals and the United States Court of Appeals for the Tenth Circuit as to the jurisdiction of the United States Claims Court.

The threshold issue in this case involves the transfer of the case by order of the Tenth Circuit Court of Appeals from the United States District Court for the District of Kansas to the United States Claims Court. The Tenth Circuit Court of Appeals in a decision published at 766 F.2d 430 (10th Cir. 1985) ordered this case transferred to the Claims Court pursuant to 28 U.S.C. 1631 because, in its view, "when the 'prime objective' or the 'essential purpose' of a complaining party is to obtain money from the federal government (in an amount in excess of $10,000.00), the Claims Court's exclusive jurisdiction is triggered". The court reasons that a party may not circumvent the

Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief when the thrust of the suit is to obtain money from the United States. (Appendix at C.)

In this case, Petitioners originally brought their suit in the United States District Court for the District of Kansas pursuant to 28 U.S.C. 1331. The basis for the claims were both constitutional and statutory. The Petitioners argued that they were entitled to a due process hearing before their rights could be terminated pursuant to the 5th Amendment to the United States Constitution and 42 U.S.C. 2944. Petitioner Rogers, a black, low-income resident of Southeast Kansas, complained because he felt the actions of the Respondent discriminated against black Americans and were barred by the equal protection clause embodied in the 5th Amendment of the United States Constitution, as well as 42 U.S.C. 2000(d).

There was some substance to Petitioners' complaint. The practical effect of the policy of CSA was to allow rural community action agencies, which were generally small, rural and white, to continue through the transition to the block grant program funding without any problems. These agencies had funds from CSA extending into the next fiscal year, as well as full fiscal year funding under the block grant program. This was important because block grant funds were not released by the Reagan Administration until December of 1981, three months after the federal fiscal year began.

On the other hand, urban agencies and large rural agencies having significant segments of the black population among their constituents and management staff were faced with a difficult situation. Both SEK-CAP and EOF

were essentially cut off from funds. No new funds came to replace the existing funds until December of 1981, leaving these agencies with virtually no funding available to operate. Petitioner Rogers alleges that black people suffered disproportionately under the split funding policy and that, therefore, the policy should be subjected to analysis under equal protection standards and the mandate of 42 U.S.C. 2000(d). Further, Petitioner CAAs feel they have a claim pursuant to the due process clause of the 5th Amendment to the United States Constitution concerning Respondent not providing their second installment of funding.

Any person mildly familiar with community action programs would know that the actions that CSA took would have had discriminatory effect against large CAAs and black people. Petitioner Rogers and Petitioner CAAs felt that they had cognizable claims against officials of the United States on a constitutional due process and equal protection basis. Petitioner Rogers has a claim pursuant to 42 U.S.C. 2000(d). These claims were transferred by the Tenth Circuit Court of Appeals to the United States Claims Court. The Claims Court subsequently held it had no jurisdiction over Petitioners' constitutional and due process equal protection claims. This was affirmed by the United States Court of Appeals for the Federal Circuit. Thus, the claim was never adjudicated.

This being the case, there is a genuine conflict between the Federal and the Tenth Circuits concerning the Claims Court's jurisdiction. The Tenth Circuit Court of Appeals has a broad view that any claim, no matter what the theory, which would compel that payment of money by the United States is a claim which belongs in the Claims Court. Thus, even if the payment of money is an indirect

result of a judicial mandate to change an illegal policy or procedure, the Claims Court would have exclusive jurisdiction. The Claims Court and the United States Court of Appeals for the Federal Circuit takes a different view. They view the jurisdiction of the Claims Court to adjudicate constitutional issues as limited and find no jurisdiction to adjudicate claims pursuant to 42 U.S.C. 2000 (d). In the view of the Federal Circuit, only those constitutional provisions which mandate the payment of money can be adjudicated in the Claims Court, and no racial discrimination claims can be adjudicated. This conflict should be resolved and there should be a definitive interpretation of relevant jurisdictional statutes so that a constitutional due process claim or equal protection claims, as well as claims pursuant to 42 U.S.C. 2000(d), can be adjudicated in some court.

In sum, the practical effect of this jurisdictional uncertainty in this case was to deprive SEK-CAP and EOF from adjudicating their constitutional claims. Further, Petitioner Rogers was prevented from presenting any evidence whatever as to the racial impact of the Respondent's actions. Also, Petitioner Rogers was prevented from providing any evidence about the intent of the parties in that regard and adjudication of his racial discrimination claim.

Petitioners believe that some court should have jurisdiction to review these issues. Either the Claims Court has jurisdiction to review all of the complaints alleged by the Petitioners or the district court does. In either event, there is a conflict of interpretation now existing which has prevented Petitioners, and particularly Petitioner Rogers, from having relevant claims heard and determined. This is a conflict which needs to be resolved by this Court.

Secondly, there is an important question of great concern present here. The United States made an agreement with SEK-CAP and EOF that it would pay its second installment of funding if funding was available. There was also a legitimate claim of entitlement to the second installment of funding and Petitioners were entitled to due process before such right was denied. *Board of Regents v. Roth,* 408 U.S. 564 (1972). Petitioners never received funds due and never received a due process hearing when they were deprived of this entitlement. Under regulations which existed at the time SEK-CAP and EOF were refunded, Petitioners could have challenged a reduction in funding on statutory grounds, but did not do so because of the promise of a second installment of funding.

After the Omnibus Reconciliation Act of 1981 was passed, there were funds remaining which were sufficient to pay the Petitioners in this case. Those funds were diverted and used to fund agencies with which CSA had no ongoing commitment. Refunding for CAAs funded after August 13, 1981, could have been denied on the basis that no future appropriations were available. Instead, CSA provided full funding to all "small CAAs" after the Omnibus Reconciliation Act of 1981 was passed. By spending some $30 million in this way, Petitioner organizations, their constituents and others received no funds to operate through transition while "small" CAAs received full funding under CSA and under the block grant program. Thus, large CAAs suffered considerably while small CAAs had a windfall.

Further, CSA returned $8 million to the United States Treasury on the last day of its existence, a sum sufficient to fund the Petitioners. Moreover, money was

appropriated in FFY 1982 for CSA close-out expenses from which Petitioners could have been funded.

It is important that the United States pay its obligations. Funds were available, but the United States did not pay them to Petitioners. This Court should use its supervisory power to assure that the United States pays Petitioners.

Finally, CSA adopted a policy of different funding patterns for large and small CAAs. This pattern of split funding should have been published in the Federal Register to be effective. 42 U.S.C. 2971(b). It was not. The regulation should have been declared null and void, and CSA and its successor should be compelled to provide full funding to Petitioners.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the writ of certiorari be allowed.

Respectfully submitted,

WILLIAM E. METCALF
Counsel of Record
JO LYNNE JUSTUS
METCALF AND JUSTUS
3601 SW 29th, Suite 207
P.O. Box 2184
Topeka, Kansas 66601
(913) 273-9904
*Attorneys for Petitioners*

# APPENDIX

## APPENDIX A

(Decided September 28, 1988)

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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88-1237

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WALLACE ROGERS, SOUTHEAST KANSAS COMMUNITY ACTION PROGRAM, INC. and the ECONOMIC OPPORTUNITY FOUNDATION, INC.,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

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DECIDED: September 28, 1988

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Before MAYER, *Circuit Judge*, NICHOLS, *Senior Circuit Judge*, and MICHEL, *Circuit Judge*.

PER CURIAM.

## DECISION

The judgment of the United States Claims Court, 14 Cl.Ct. 39 (1987), dismissing the complaint is *affirmed*.

## OPINION

The court convincingly explains that the now defunct Community Services Administration, facing the uncommon requirement to permanently close itself down, acted in all respects within its discretion and in accordance with law. The court was also correct in its determination that it had no jurisdiction over the due process, equal protection, and discrimination claims.

## APPENDIX B

(Filed December 16, 1987)

IN THE UNITED STATES CLAIMS COURT

No. 444-85C

WALLACE ROGERS, SOUTHEAST KANSAS COMMUNITY ACTION PROGRAM, INC. AND THE ECONOMIC OPPORTUNITY FOUNDATION, INC.

v.

THE UNITED STATES

Contract; jurisdiction; administrative discretion in allocating funds; standard of review; racial discrimination; Impoundment Control Act.

*William E. Metcalf,* Topeka, Kansas, attorney for the plaintiffs.

*Stuart James,* Washington, D.C., with whom was *Assistant Attorney General Richard K. Willard,* for the defendant.

OPINION

MARGOLIS, *Judge.*

Plaintiffs, two Kansas community action agencies which provide assistance to low-income persons, and Wallace Rogers, a recipient of such assistance, brought this action challenging defendant's refusal to fund plaintiffs' entire 1981 program year. The parties filed cross motions for summary judgment. Defendant has also filed

a partial motion to dismiss. After having reviewed the record and after hearing oral argument, defendant's partial motion to dismiss is granted and defendant's motion for summary judgment is granted. The plaintiffs' motion for summary judgment is denied.

## FACTS

The Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended at 42 U.S.C. §§ 2701-2996) (repealed in part 1981), established the Office of Economic Opportunity (OEO). OEO and its successor agency, the Community Services Administration (CSA), provided financial assistance to the low income population through various state and local community action agencies (CAAs). Until 1974, each CAA was funded with one grant to cover its entire program year. In 1974, Congress failed to appropriate sufficient funds to re-fund all CAAs at their 1973 levels. To cope with the lowered federal fiscal year (FFY) 1974 appropriation, CSA decided to fund each CAA only to the end of FFY 1974 rather than to the end of the CAA's program year. This change allowed CSA to fund individual CAAs at pre-reduction FFY 1973 levels.

In 1975, the closing date of the FFY was changed from June 30 to September 30. CSA, buoyed by supplemental appropriations, took advantage of this change in the FFY to restore many CAAs to full program year funding. To do this, CAAs were divided into two categories: large CAAs, which received over $300,000 annually in Section 221 (42 U.S.C. § 2808) funds, and small CAAs, which received less than $300,000 annually in Section 221 funds. There were approximately 740 small CAAs and 160 large CAAs. Small CAAs were

returned to full program year funding. However, there were not sufficient funds available to return all large CAAs to full program year funding, and, instead, large CAAs received their funding through two separate grants: one grant covering the period from the beginning of the CAA's program year to the end of the FFY on September 30, and a second grant covering the period from the beginning of the subsequent FFY on October 1 to the end of the CAA's program year.

During this period, large CAAs generally had their programs funded from congressional appropriations from two separate FFYs, while small CAAs were generally funded at the beginning of their program year from congressional appropriations from that FFY. In line with the agency's regulations, CSA's objective was to eventually put all CAAs, both large and small, on full program year funding. *See* 45 C.F.R. § 1067.30-5(8) (stating that "whenever possible" funding will coincide with the program year). By 1981, CSA had restored many large CAAs to full program year funding.

The Omnibus Budget Reconciliation Act of 1981 (Act), Pub. L. No. 97-35, § 683, 95 Stat. 357, 519, enacted on August 13, 1981, repealed major components of the Economic Opportunity Act and altered the method by which federal funds were distributed to CAAs. These changes were to become effective at the beginning of the following FFY, October 1, 1981. The Act abolished the CSA and replaced it with a Community Service Block Grant Program, which authorized the Secretary of Health and Human Services to make block grants directly to the States "to ameliorate the causes of poverty in communities within the State." 42 U.S.C. § 9901(a). The

Act provided for the Director of the Office of Management and Budget to provide for the termination of the affairs of the CSA. 42 U.S.C. § 9911(e).

The Act provided that, subject to certain reductions, each State would receive "an amount which bears the same ratio to such remaining amount as the amount received by the State for fiscal year 1981 under Section 2808 of this title bore to the total amount received by all States for fiscal year 1981 under such part." 42 U.S.C. § 9903(a)(1). The States were then free to use this money at their discretion to fund anti-poverty efforts, including funding the former CAAs. 42 U.S.C. §§ 9902 (1), 9904(c). The Act permitted States to opt out of the block grant program for FFY 1982 and instead have the Secretary of Health and Human Services directly fund State and local CAAs under the former law. 42 U.S.C. § 9911. Beginning in FFY 1983, all States were required to operate under the block grant program. The State of Kansas elected to participate in the block grant program for FFY 1982.

Plaintiffs Southeast Kansas Community Action Program (SEK-CAP) and Economic Opportunity Foundation (EOF) are large CAAs in Kansas. Plaintiff Wallace Rogers is a low-income Kansas resident served by SEK-CAP. SEK-CAP's program year runs from June 1 through May 31. SEK-CAP received $384,000 for program years 1978, 1979, and 1980. On June 1, 1981, SEK-CAP received $114,222 in Section 221 funds for the first four months of its program year through September 30. EOF's program year runs from April 1 to March 31. EOF's annual Section 221 funding was $639,000 for fiscal years 1978, 1979, and 1980. On April 1, 1981, EOF received Section 221 funding of $300,200 for six months of funding

through September 30, 1981. EOF also received an additional $80,000 in Section 221 funds on September 30, 1981. With the passage of the new Act on August 13, 1981, there were no monies appropriated to CSA with which to fund CAAs for FFY 1982.

As of August 13, 1981, there remained available less than $30 million of unobligated Section 221 funds, which was approximately eight percent of CSA's FFY 1981 appropriation for the Section 221 program. CSA chose to follow its historical funding pattern and use the remaining Section 221 funds from FFY 1980 to continue funding in full small CAAs whose program years began after August 13 while funding large CAAs only to the end of FFY 1981. After funding these CAAs, surplus funds totaling $1.4 million from FFY 1981 remained in the CSA region responsible for distributing funds to CAAs in Kansas. Although the director of this region requested authority to distribute the remaining FFY 1980 funds to large CAAs to cover at least a portion of their program years remaining after October 1, 1981, as had been done in other regions, this request was denied. Instead, CSA recalled the funds to cover close-out administrative expenses and to serve as a reserve for the Anti-Deficiency Act, 31 U.S.C. § 1512.

As FFY 1981 drew to a close, it became evident that the block grant program would not be prepared to disburse funds to the large CAAs in the near future. Large CAAs that had not received the FFY 1982 portion of their 1981 program year budget thus found themselves without any forthcoming FFY 1982 funds.

Therefore, on the last day of FFY 1981, September 30, 1981, the day before the new Act was to take

effect and CSA was to be abolished, plaintiffs brought an action in the District Court for the District of Kansas seeking declaratory, injunctive, and other relief. Plaintiffs sought to enjoin the CSA from returning to the Treasury the $8 million that remained of CSA's 1981 appropriations, to obtain a declaratory judgment that CSA's funding decisions from August 13, 1981 to October 1, 1981 violated applicable law and regulations, and to compel CSA to provide funding for SEK-CAP and EOF for the remainders of their 1981 program years. The district court denied plaintiff's motion for a temporary restraining order that would prevent CSA's 1981 appropriations from lapsing into the Treasury. Thereafter, the district court granted the defendant's motion to dismiss, treating it as a motion for summary judgment.

On appeal, the Tenth Circuit Court of Appeals held that the district court lacked jurisdiction to entertain the suit. *Rogers v. Ink,* 766 F.2d 430, 436 (10th Cir. 1985). The court of appeals held that because the suit sought damages from the government in excess of $10,000 premised on constitutional, contractual, statutory, and regulatory grounds, exclusive jurisdiction rests in the Claims Court pursuant to the Tucker Act, 28 U.S.C. § 1491 (a)(1). *Id.* at 433-36. The court of appeals vacated the district court's dismissal on the merits and remanded the case to the district court "with directions that the action be transferred to the United States Claims Court 'in the interests of justice' under 28 U.S.C. § 1631." *Id.* at 436.

Plaintiffs accordingly filed a complaint with this court on August 30, 1985 seeking judgment against the United States in the amount of $338,000 plus interest on behalf of plaintiff EOF and $354,778 plus interest on be-

half of plaintiffs SEK-CAP and Wallace Rogers. Plaintiffs also seek to recover their costs and attorneys' fees. There being no issues of material fact, the parties have filed cross motions for summary judgment. The defendant has also filed a partial motion to dismiss.

## DISCUSSION

Plaintiffs make multiple claims attacking CSA's actions pertaining to distribution of Section 221 funds during FFY 1981. Plaintiffs charge that:

(1) CSA's approval of plaintiffs' grant applications created an express and implied-in-fact contract, which the defendant breached by failing to issue plaintiffs the remaining amounts due under their grants.

(2) The defendant engaged in arbitrary and capricious decisionmaking in violation of the Administrative Procedure Act.

(3) The defendant failed to provide any reason for the denial of funding as required by 42 U.S.C. § 2944 and 45 C.F.R. § 1067.2.

(4) The defendant failed to afford plaintiffs the opportunity for a full and fair hearing as required by 42 U.S.C. § 2944 and 45 C.F.R. § 1050.115.

(5) In disbursing FFY 1981 funds, defendant violated statutory and regulatory provisions requiring the equitable distribution of funds as required by 42 U.S.C. §§ 2833(b), 2836(8), 2967.

(6) The defendant failed to comply with the requirements of 45 C.F.R. § 1067.30-5(8) that whenever possible grantees shall be funded for their entire program year.

(7) The defendant violated plaintiffs' due process and equal protection rights in violation of the Fifth Amendment of the United States Constitution.

(8) The defendant violated 42 U.S.C. § 2000d that no person should be denied benefits under a federal program on account of race.

(9) The defendant's actions constituted an illegal impoundment of funds in violation of the Impoundment Control Act of 1974, 31 U.S.C. §§ 1400-1407 (current version at 2 U.S.C. §§ 681-688 (1982)).

Defendant denies each of these contentions and moves for summary judgment. Defendant also moves to dismiss the due process, equal protection, and racial discrimination claims for lack of jurisdiction.

A. *Breach of Contract*

This court has jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to render judgment on claims for money arising out of a contract with the United States, or under a statute or regulation requiring, or fairly interpreted to require, the payment of money. *United States v. Testan*, 424 U.S. 392, 397-98 (1976); *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967). Because plaintiffs request money damages under an implied-in-fact contract with the government, this court has jurisdiction over the claim.

The parties agree that CSA's approval of plaintiffs' grant application formed an implied-in-fact contract. Both parties agree that the government's obligation under this implied-in-fact contract to provide funding was contingent on two factors: (1) that the plaintiffs comply

with all grant conditions; and (2) that funds were available. The government does not allege that either SEK-CAP or EOF violated any grant conditions. The dispute therefore centers on whether or not CSA had any funds available with which to pay plaintiffs for that part of their 1981 program year that extended into FFY 1982.

Because plaintiffs are large CAAs, they did not receive a single grant to cover the entire program year; each received two grants, one covering the period from the beginning of the program year until the end of the FFY and a second grant covering the period between the beginning of the subsequent FFY until the end of the CAA's program year. Small CAAs received one grant that covered the entire program year. For the year at issue, plaintiffs' program year began towards the middle of FFY 1981 and ended towards the middle of FFY 1982. The original purpose for bifurcating the funding for large CAAs was so that the first grant could be funded with funds appropriated during that FFY, and the second grant, covering that part of plaintiffs' program year that extended into the next FFY, would come from funds appropriated for the next FFY in the event the appropriations for the preceding FFY were exhausted. For example, had appropriations for the CSA been continued for FFY 1982, plaintiffs would have received FFY 1981 funds for the first half of their program year and FFY 1982 funds, or FFY 1981 funds if any remained available, for the second half of their program year.

It is likely all would have gone according to plan except that Congress decided to repeal the Economic Opportunity Act and replace it with a block grant program supervised by the States. The vote to repeal the

Economic Opportunity Act and to dismantle the CSA occurred on August 13, 1981. The termination of the CSA was to occur on October 1, 1981, the first day of FFY 1982. Therefore, CSA did not receive any FFY 1982 appropriations—appropriations that were needed to avoid having to reduce CAA program year funding.

The absence of FFY 1982 appropriations left CSA in a quandary. On the day of the vote to dismantle the agency, August 13, 1981, CSA found itself with slightly less than $30 million in unexpended FFY 1981 Section 221 funds, which represented about eight percent of its FFY 1981 Section 221 appropriation. At this time, the vast majority of CAAs were small CAAs that had already received full funding for their entire 1981 program years. Many large CAAs, including the plaintiffs, had received funding only for the remainder of FFY 1981. CSA did not have sufficient funds available both to fund each remaining small CAA for its entire program year and to fund each large CAA for the FFY 1982 portion of its program year. CSA determined that it would be more equitable and less disruptive to fund all grantees according to their historical funding patterns, *i.e.*, full program year funding for small CAAs and split funding for large CAAs. The result of this policy was that many of the small CAAs were funded for a period of time in FFY 1982 with the remaining FFY 1981 funds. Large CAAs, including the plaintiffs, however, received few FFY 1981 funds for use in FFY 1982.[1] CSA expected that the block grant program would fund the FFY 1982 portion of the large CAAs' 1981 program year.

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1. Plaintiff EOF, however, did receive a grant of $80,000 on September 30, 1981, which covered part of its program year that extended into FFY 1982.

After re-funding all of the small CAAs in Region 7, where plaintiffs are located, there remained approximately $1.4 million in unobligated Section 221 funds. Plaintiffs claim that these funds should have been used to satisfy the remainder of plaintiffs' grants. In fact, the Regional Director of Region 7 proposed to distribute these funds to large CAAs in Region 7. These proposals were not approved, however, and in late September 1981, CSA recalled the $1.4 million in Section 221 funds to pay administrative expenses and to serve as a cushion for the Anti-Deficiency Act. On September 30, 1981, $8 million of CSA appropriations lapsed into the Treasury. This money was the remainder of the fund that had been accumulated for Anti-Deficiency Act purposes and to pay CSA close-out expenses. Plaintiffs contend that the existence of these monies indicates that funds were available with which to fulfill the contract and that the government acted arbitrarily and capriciously in not so using the funds.

1. *Arbitrary and Capricious Decisionmaking*

Plaintiffs allege that CSA's method of distributing funds after August 13, 1981 constituted arbitrary and capricious decisionmaking in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(a). The scope of review under Section 706(2)(a) of the Administrative Procedure Act is limited. The court's inquiry is not whether it agrees with the agency's decision, but rather, whether the decision was based on relevant factors, whether the decision lacked a rational basis, or whether the decision represents a clear error of judgment. *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974); *Bunge Corp. v. United States*,

5 Cl. Ct. 511, 522 (1984), *aff'd*, 765 F.2d 162 (Fed. Cir. 1985). The agency's decision is entitled to substantial deference. *Bunge Corp.*, 5 Cl. Ct. at 522. For the agency's decision to be upheld, "it is not necessary to find that the agency construction is the only reasonable one," and "the judicial function is exhausted when there is found to be a rational basis" for the administrative decision. *Port Authority of St. Paul v. United States*, 193 Ct. Cl. 108, 120, 432 F.2d 455, 461 (1970). The court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation*, 419 U.S. at 285-86.

During August 1981, for CSA to have fully eliminated the distinction between large and small CAAs and to distribute FFY 1981 funds ratably, as plaintiffs suggest was the proper method of distribution, CSA would have had to attempt to withdraw funds already committed to those CAAs whose 1981 grant applications were approved and fully funded prior to August 13, 1981. While a *pro rata* distribution may have been a fairer means of distributing all remaining Section 221 funds, CSA's method of distributing the funds did not amount to an abuse of discretion. In fact, the evidence suggests that CSA made every effort to fund all CAAs to the maximum degree possible while at the same time attempting to attend to an orderly close-out. In addition, CSA anticipated that the block grant program would be in place and functioning in early FFY 1982 to fund the FFY 1982 requirements of large CAAs. *See* 127 Cong. Rec. 18940 (1981) (statement of Rep. Ashbrook) (stating that "[e]fforts are underway to insure that community action programs move forward effectively through the transition.")

The termination of an agency presents the agency's director with a set of difficult decisions to make. In this case, the director continued to fund all CAAs according to the practice that had been developed in 1974. CSA's director believed that insufficient time and funds remained available after August 13, 1981 to establish a new method of distributing the remaining Section 221 funds. Therefore, in the interest of fairness and in light of the heavy workload demanded by close-out responsibilities, the director determined that CSA should continue to follow its preexisting funding policy.

Plaintiffs argue that it was an abuse of discretion for CSA to incur new obligations by funding small CAAs after August 13, 1981 while it was still contractually bound to pay plaintiffs. Plaintiffs' argument, if successful, would completely frustrate the purpose for which split funding was developed. The entire reason split funding was developed was because CSA did *not* have sufficient appropriated funds from a single FFY to fully fund all CAAs on a program year basis. Either CAAs would have to take a cut in funding, or some CAAs would have to receive funds from the subsequent FFY. CSA determined that large CAAs would receive a portion of their appropriations at the beginning of the following FFY. Furthermore, in deciding to maintain the split funding pattern during 1981, CSA anticipated that the new block grant program would satisfy many of plaintiffs' FFY 1982 needs.

The CSA director also set aside some funds to serve as a cushion for the Anti-Deficiency Act and to pay for certain administrative expenses. Plaintiffs contend that these funds were wrongfully transferred and should be used to pay plaintiffs' grants. Plaintiffs' argument is not

compelling. The Anti-Deficiency Act specifically allows agencies to apportion or reapportion an appropriation to establish a reserve to provide for contingencies. *See* 31 U.S.C. § 1512(c)(1)(a). In view of the large size of Section 221 appropriations, the amount CSA apportioned for Anti-Deficiency Act purposes does not seem to constitute an excessive reserve. The establishment of such a reserve was within the director's discretion, and his decision to so apportion CSA's appropriations was not an abuse of that discretion.

Following enactment of the Omnibus Budget Reconciliation Act on August 13, 1981, Mr. Dwight Ink, CSA Director from June 30, 1981 until September 31, 1981, was concerned that Congress would not appropriate funds for CSA close-out costs. The Act did not include any appropriations for close-out costs. As a result, Mr. Ink believed it necessary to take measures to insure that CSA could meet its obligations to its employees. Mr. Ink sought advice from CSA's General Counsel on whether CSA could use program funds for administrative close-out expenses. The General Counsel informed Mr. Ink that such a transfer was permissible. In addition, CSA sought guidance from the Office of Management and Budget (OMB) on using FFY 1981 funds for administrative expenses.[2] OMB notified CSA that it was appropriate for CSA to expend the remaining FFY 1981 appropriations to pay certain administrative expenses, including severance pay, lump sum annual leave, and outstanding travel obligations. *See* Appendix, Plaintiffs' Motion for Summary Judgment at E-157. Finally, on October 1, 1981, the day CSA expired, Congress did in fact enact a

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2. The Budget Reconciliation Act provided that OMB was to supervise the termination of CSA's affairs. 42 U.S.C. § 9911(e).

continuing appropriation for FFY 1982 that included funds for CSA close-out expenses.

Faced with limited time and money, CSA attempted to dole out its resources in such a way as to protect its employees and at the same time to fund as many CAAs as possible. CSA's decision to continue its pattern of funding CAAs did not represent a clear error of judgment and was not an abuse of discretion. Therefore, this court concludes that CSA's method of distributing funds after August 13, 1981 had a rational basis and was not arbitrary or capricious.

2. *Availability of Funds*

Plaintiffs allege that the $8 million that lapsed into the Treasury constituted available funds. Plaintiffs also allege that the $1.4 million in Region 7 Section 221 funds, which were transferred to CSA's administrative account, could have been used to fund plaintiffs. Plaintiffs make much of the fact that in some prior years EOF and SEK-CAP received their second grants from the previous year's funds. That fact is not relevant to the issue before this court. That the second grant had on occasion come from the previous year's funding did not, as plaintiffs argue, create a "historical funding pattern" to which the defendant was bound.

The implied-in-fact contract obligated CSA to fund plaintiffs with FFY 1982 funds, if appropriated, or with FFY 1981 funds *if any were available*. Congress chose not to appropriate any FFY 1982 Section 221 funds, and CSA chose to use FFY 1981 funds for other purposes. The fact that for the past two years CSA had sufficient funds available to pay plaintiffs' second grants from Section 221 funds remaining from the preceding FFY, does not ob-

ligate CSA to do so in this case. The distribution of FFY 1981 funds was within CSA's discretion. CSA, faced with its own termination, decided that the remaining FFY 1981 funds would be applied to termination expenses and Anti-Deficiency Act purposes and, as a result, plaintiffs would not receive their second grant. At the close of FFY 1981, because of these obligations, there were not sufficient Section 221 funds available with which to fund plaintiffs.

3. *Publication in the Federal Register*

The Economic Opportunity Act requires that all rules, regulations, guidelines, instructions, and application forms must be published in the Federal Register at least 30 days before they are to become effective. 42 U.S.C. § 2971b. Plaintiffs contend that CSA failed to publish its policy of split funding large CAAs, such failure rendering the policy void. Plaintiffs argue that in the absence of a published split funding policy, they are entitled to one grant covering the entire approved program year. In fact, plaintiffs maintain that CSA published a rule that was contrary to the split funding policy. Plaintiffs are correct that 45 C.F.R. § 1067.30-5(8) expresses a policy that "whenever possible the grantee's fundings will coincide with the grantee's program year." However, the immediately preceding sentence of that regulation unambiguously states that a grantee's program year "will not necessarily agree with the period for which funds are awarded." This section does state, in general terms, CSA's policy regarding split funding, and this section was published in the Federal Register at 41 Fed. Reg. 56197 (Dec. 27, 1976).

CSA's failure to publish specific guidelines in the Federal Register concerning the mechanics of the split funding policy, although the details of the policy probably should

have been published, does not render the policy void in this case. Plaintiffs EOF and SEK-CAP had notice of the split funding policy from its inception as they were the policy's first beneficiaries. In 1974, CSA began split funding for all CAAs to avoid a reduction in CAA funding. If CSA had continued to fund CAAs on a program year basis, all CAAs, including plaintiffs, would have received a reduction in funding of up to 40 percent from the 1973 funding levels.

In *Nason v. Kennebec County CETA,* 646 F.2d 10 (1st Cir. 1981), the court of appeals reviewed CETA's failure to publish an interpretative rule in the Federal Register as required by a statutory provision identical to the one in the Economic Opportunity Act. *Id.* at 19. Just as the plaintiffs in this case have relied on the Administrative Procedure Act, 5 U.S.C. § 551(4), for clarification of 42 U.S.C. § 2971b, the court in *Nason* used Section 552(a)(1) of the APA to shed some light on the CETA provision. The court concluded that the failure to publish a rule "would not invalidate an otherwise proper rule where the party adversely affected had 'actual and timely notice'" of the rule. *Nason,* 646 F.2d at 19 (citing 5 U.S.C. § 552(a)(1)).

In this case, not only did plaintiffs have knowledge of a policy that had been going on for six years, but plaintiffs initially benefited from the policy. Regardless, in this case, properly promulgated CSA regulations, while expressing a preference for program year funding, effectively state a policy that CSA funding might not coincide with the grantee's program year. While perhaps the details of CSA's split funding policy should have been published, CSA's failure to do so in this particular case does not render the split funding policy void.

B. *Statutory and Regulatory Compliance*

Plaintiffs further allege that the defendant has violated a number of statutory and regulatory provisions. These include: failure to receive the due process rights mandated by the statute and regulation; failure to distribute funds equitably; failure to distribute funds equitably between urban and rural beneficiaries; and, failure to fund all grantees on a program year basis.

1. *Due Process Rights Under the Statute and Regulations*

Before repeal by Congress, 42 U.S.C. § 2944 required the Director of CSA to prescribe procedures to assure that grantees receive notice of and an opportunity to be heard in the event refunding is denied or if funding is terminated. Both plaintiffs and defendant agree that this is not a situation where refunding has been denied. Plaintiffs SEK-CAP and EOF had their grant action applications approved for an entire program year. Therefore, the regulation governing a denial of refunding, 45 C.F.R. § 1067.2, is not applicable.

Plaintiffs argue that CSA's failure to provide the remainder of funds due under their grant actions constituted a termination of funding under 45 C.F.R. § 1050.115. Section 1050.115-2(a) defines termination of a grant as the "cancellation of Federal assistance." In this case, assistance was not terminated. On the date the second grant payment was due, October 1, 1981, CSA did not have any funds available. The condition precedent to the plaintiffs' contract with CSA—the availability of funds—did not occur. Therefore, plaintiffs were not entitled to notice and a hearing.

2. *Equitable Distribution of Financial Assistance*

In 42 U.S.C. § 2967 and § 2833(b), the Director of CSA is required to distribute funds equitably between residents of rural and urban areas. Similarly, 42 U.S.C. § 2836(8) mandates that financial assistance "be distributed on an equitable basis in any community and within any State." Plaintiffs believe that CSA's funding pattern, by denying plaintiffs FFY 1982 funding, violated these provisions of the Economic Opportunity Act.

Because all CAAs received full funding for FFY 1981, the plaintiffs' argument must be that serious inequities in funding resulted during FFY 1982, which began on October 1, 1981, the same day that the CSA ceased to exist and 42 U.S.C. §§ 2833(b), 2836(8) and 2967 were repealed. *See* 42 U.S.C. § 9912(a). Because the statute was repealed on the same day the Director was unable to fund plaintiffs, the Director's inability to fund plaintiffs could not violate the repealed statutory provisions. There are no indications that any of these alleged statutory violations occurred during FFY 1981 when the statute was in effect.

3. *Program Year Funding*

Section 1067.30-5(8), 45 C.F.R., provides that "whenever possible the grantee's fundings will coincide with the grantee's program year." This regulation states only a policy and is not phrased in mandatory terms. The Director is not required to fund every CAA for the entirety of its program year; rather, CSA's policy is that *whenever possible*, at the Director's discretion, a CAA will be funded for its entire program year. In fact, the vast majority of all CAAs both small and large had gradually been transferred to full program year funding.

The Director cannot be said to have violated this regulation.

C. *Jurisdiction over Due Process, Equal Protection, and Racial Discrimination Claims*

Plaintiffs also present claims that their rights of equal protection and due process of the law have been violated. These claims must be dismissed because this court does not have jurisdiction over claims founded solely on violations of the equal protection and due process components of the Fifth Amendment.

Although the Tucker Act, 28 U.S.C. § 1491(a)(1), grants this court jurisdiction over claims brought against the United States and founded upon the Constitution, it is well settled that this court's jurisdiction extends only to claims upon which monetary damages are mandated. *See Testan,* 424 U.S. at 400; *Mack v. United States,* 225 Ct. Cl. 187, 191, 635 F.2d 828, 832 (1980), *cert. denied,* 451 U.S. 913 (1981); *Cabrera v. United States,* 10 Cl. Ct. 219, 221 (1986). The Tucker Act itself does not create any substantive rights enforceable against the United States. *Testan,* 424 U.S. at 398; *Walker v. United States,* 11 Cl. Ct. 77, 78 (1986). Therefore, it is necessary for the court to determine whether the constitutional clause or the legislation to which plaintiffs cite can fairly be interpreted to mandate monetary compensation by the United States for the damage sustained. If not, the Claims Court does not have jurisdiction to grant relief. *Eastport Steamship Corp.*, 178 Ct. Cl. at 607, 372 F.2d at 1009.

In this case, the plaintiffs allege that they have been deprived of equal protection of the laws and de-

prived of their property without due process of law in violation of the Fifth Amendment. This court has repeatedly stated that these components of the Fifth Amendment standing alone do not mandate payment of monetary damages. *Alabama Hospital Association v. United States*, 228 Ct. Cl. 176, 180, 656 F.2d 606, 609 (1981), *cert. denied*, 456 U.S. 943 (1982); *Mack*, 225 Ct. Cl. at 192, 635 F.2d at 832; *Carruth v. United States*, 224 Ct. Cl. 422, 445, 627 F.2d 1068, 1081 (1980); *Walton v. United States*, 213 Ct. Cl. 755, 757 (1977); *Cabrera*, 10 Cl. Ct. at 222. Plaintiffs' reliance on *Yuba National Resources, Inc. v. United States*, 10 Cl. Ct. 486 (1986), *rev'd*, 821 F.2d 638 (Fed. Cir. 1987), is misplaced. The court in *Yuba* applied the Takings Clause of the Fifth Amendment, a clause that specifically mandates compensation; the court did not review a claim based upon the Due Process Clause as plaintiffs do here. Therefore, plaintiffs' due process and equal protection claims must be dismissed because they do not fall within this court's jurisdiction.

Plaintiffs' racial discrimination claim succumbs to a different jurisdictional limitation. Claims of racial discrimination based upon a statute may only be brought in a United States District Court. 28 U.S.C. § 1343; *J & L Janitorial Services v. United States*, 231 Ct. Cl. 837, 838 (1982); *Williams v. United States*, 212 Ct. Cl. 544, 544-45 (1976). Section 1343 gives United States District Courts original jurisdiction over civil actions commenced "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." 28 U.S.C. § 1343(a)(4). As a result, the United States District Courts have exclusive jurisdiction for claims based on 42 U.S.C. §§ 2000d

to 2000d-6, which is an Act of Congress providing for the protection of civil rights. Therefore, plaintiffs' racial discrimination claim based on 42 U.S.C. § 2000d must be dismissed.

D. *Impoundment of Funds*

Plaintiffs' final claim is that the defendant's failure to deplete its entire appropriation, thereby allowing $8 million to lapse into the Treasury, violated the requirements of the Impoundment Control Act of 1974, 31 U.S.C. §§ 1400-1407 (current version at 2 U.S.C. §§ 681-688 (1982)). Although the Impoundment Control Act does manifest congressional disapproval of unauthorized impoundments by the Executive Branch, an examination of the statute indicates that Congress did not intend to create a private cause of action in cases of unauthorized impoundments. Instead, Congress expressly provided that lawsuits based on the Impoundment Control Act must be brought by the Comptroller General in the United States District Court for the District of Columbia. 31 U.S.C. § 1406 (current version at 2 U.S.C. § 687 (1982)); *see also Rocky Ford Housing Authority v. United States Department of Agriculture*, 427 F. Supp. 118, 134 (D.D.C. 1977).

In every action under the Impoundment Control Act, the Comptroller General must receive the tacit approval of Congress. *See* 31 U.S.C. § 1406 (2 U.S.C. § 687 (1982)) (requiring the expiration of 25 days of continuous session of Congress following the Comptroller's explanatory statement before the Comptroller may file a civil action). This court is compelled to conclude that this lawsuit does not state a cause of action for violation of the Impoundment Control Act. Therefore, this claim is dismissed.

## CONCLUSION

Plaintiffs have raised numerous bases upon which they seek payment for the FFY 1982 portion of their 1981 program year funding. Performance under the implied-in-fact contract was conditioned upon the availability of Section 221 funds. No such funds were available. While CSA, in its discretion, could have used FFY 1981 appropriations to fund plaintiffs, it chose not to do so. CSA's allocation of FFY 1981 Section 221 appropriations for other purposes was not arbitrary, capricious, or in violation of regulation or statute. The court is without jurisdiction to review plaintiffs' due process, equal protection, and racial discrimination claims. Based upon the foregoing reasons, the court grants the defendant's partial motion to dismiss. The court also grants the defendant's motion for summary judgment and denies the plaintiffs' motion for summary judgment. The Clerk will dismiss the complaint. Each party will bear its own costs.

/s/ Lawrence S. Margolis
Lawrence S. Margolis
Judge, U.S. Claims Court

December 16, 1987

## APPENDIX C

(Filed June 25, 1985)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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NO. 82-2286

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WALLACE ROGERS and SOUTHEAST KANSAS COMMUNITY ACTION PROGRAM, INC.,
Plaintiffs-Appellants,

vs.

DWIGHT INK, Director of the Community Services Administration, and DAVID STOCKMAN, Director of the Office of Management and Budget,
Defendants-Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. NO. 81-4212)

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David Achtenberg of Achtenberg & Achtenberg, P.C., Kansas City, Missouri, for Plaintiffs-Appellants

Richard A. Olderman, Attorney, Civil Division, Department of Justice (J. Paul McGrath, Assistant Attorney General, William Kanter, Civil Division, Department of Justice, and Jim J. Marquez, United States Attorney, Topeka, Kansas, were also on the brief) for Defendants-Appellants

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Before HOLLOWAY, Chief Judge, SEYMOUR, Circuit Judge, and BOHANON, District Judge*

HOLLOWAY, Chief Judge

Plaintiffs, a Kansas organization which provides assistance to low income residents and a recipient of such assistance, brought this action challenging defendants' refusal to fund the entire 1981 program year of the organization. This refusal followed a decision by Congress to replace the former system of direct federal funding of state and local anti-poverty organizations with a block grant program effective October 1, 1981.

The district court granted defendants' motion to dismiss, treating it as a motion for summary judgment, both on the merits and on the ground that plaintiffs' action was premature. We hold that the district court was without jurisdiction of this action which essentially requested the court to compel defendants to effect release and payment of grant funds. Accordingly, we transfer the case to the United States Claims Court.

I

Prior to 1981, the federal government provided financial assistance to low income people through various state and local Community Action Agencies ("CAAs") funded by the Community Services Administration ("CSA"). The CAAs were divided into two categories: large CAAs (which received over $300,000 annually in federal funds)

*The Honorable Luther L. Bohanon of the United States District Court for the Eastern, Northern and Western Districts of Oklahoma, sitting by designation

and small CAAs (which received less than $300,000 annually in federal funds). Large CAAs generally were funded by two separate grants: one grant at the beginning of the CAA's program year to the end of the federal fiscal year on September 30, and another grant at the commencement of the subsequent federal fiscal year on October 1 to the end of the CAA's program year. Large CAAs generally had their programs funded from congressional appropriations for two separate federal fiscal years. Small CAAs, on the other hand, generally were funded by a single grant at the beginning of the CAA's program year from congressional appropriations for one federal fiscal year. There were approximately 740 small CAAs and 160 large CAAs.

The Omnibus Budget Reconciliation Act of 1981,[1] enacted on August 13, 1981, changed the way federal funds were distributed to CAAs. These changes were effective on October 1 of that year. The CSA was abolished and replaced with a Community Service Block Grant Program which authorized the Secretary of Health and Human Services to make block grants to the states "to ameliorate the causes of poverty in communities within the State." 42 U.S.C. § 9901(a).[2] The Act authorized the Director of the Office of Management and Budget ("OMB") to provide for the termination of the affairs of the CSA.[3]

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1. Pub. L. No. 97-35, Title VI, 95 Stat. 511 (1981).

2. The Act established an Office of Community Services within the Department of Health and Human Services to carry out these functions. 42 U.S.C. § 9905.

3. The Act provided that the Director of OMB was to "provide for the transfer or other disposition of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with implementation of the authorities terminated by Section 9912(a) of this title as necessary to effectuate the purposes of this chapter." 42 U.S.C. § 9911(e).

The Act provided that after certain reductions were made from the annual appropriation, each State would receive "an amount which bears the same ratio to such remaining amount as the amount received by the State for fiscal year 1981 under Section 2808 of this title bore to the total amount received by all States for fiscal year 1981 under such part, except that no State shall receive less than one-quarter of 1 percent of the amount appropriated under section 9901 of this title for such fiscal year." 42 U.S.C. § 9903(a)(1). The states then would use this money in their discretion to fund local anti-poverty efforts, including the former CAAs. 42 U.S.C. §§ 9902 (1), 9904(c). The Act permitted states to opt out of the block grant program for fiscal year 1982 and instead have the Secretary of Health and Human Services directly fund state and local CAAs under the former law. 42 U.S.C. § 9911. Beginning in fiscal year 1983, all states were required to operate under the block grant program.

Plaintiff Southeast Kansas Community Action Program ("SEK-CAP") is a large CAA in Kansas.[4] Plaintiff Wallace Rogers is a low income Kansas resident served by SEK-CAP. SEK-CAP's program year runs from June 1 through May 31. SEK-CAP received $384,000 for fiscal years 1978, 1979 and 1980. On June 1, 1981, SEK-CAP received $114,222 in federal funding for the first four months of its program year through September 30. With the passage of the new Act on August 13, there were no monies appropriated for fiscal year 1982 to fund CAAs.

Defendants chose to use the remaining funds from fiscal year 1981 to fund the few small CAAs that had

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4. Plaintiff Economic Opportunity Foundation, a large CAA in Kansas, is not a party to this appeal.

not yet received full funding for program years beginning prior to October 1. Defendants decided not to make further payments for part or all of program years extending beyond October 1 to large CAAs that already had received their initial grant for the portion of their program year ending on September 30. Surplus funds from fiscal year 1981 totaling $1.4 million remained in the CSA region responsible for distributing funds to CAAs in Kansas after funding these small CAAs. Although the director of this region requested authority to use these remaining funds for payments to large CAAs for at least a portion of their program years remaining after October 1 as had been done in other regions, this request was denied.

Plaintiffs brought this action for declaratory, injunctive and other relief on September 30, 1981, the day before the new Act was to take effect and the day before the beginning of fiscal year 1982. Plaintiffs sought, among other things, to enjoin defendants from returning to the Treasury any appropriations made to CSA, to obtain a declaratory judgment that defendants' funding decisions from August 13 to October 1 violated applicable law and regulations, and to compel defendants to provide funding for SEK-CAP for the remainder of its program year from October 1, 1981 through May 30, 1982. The district court denied a temporary restraining order. I R. 15-18. Thereafter, defendants moved for dismissal or summary judgment, *id.* at 24-58, and plaintiffs filed a response, *id.* at 194-242. The district court treated the motion to dismiss as a motion for summary judgment because the parties had supplied various affidavits in support of their motions. *Id.* at 252.

The district court granted defendants' motion to dismiss, holding that the action was "premature and should

be dismissed on that ground" because SEK-CAP was eligible to receive money under the block grant program administered by Kansas. I R. 253-54. However, the court addressed plaintiffs' arguments on the merits and concluded as follows.

First, the disposition of funds by CSA in its final six weeks of operation did not violate the statutory minimum level of funding provided to Kansas under 42 U.S.C. § 2812(a) or the statutory guarantee of equitable distribution of funds between residents and urban areas under 42 U.S.C. §§ 2833(b) and 2967 because those sections were repealed by the new Act effective October 1, 1981, the day the decision not to give SEK-CAP additional funds became effective. 42 U.S.C. § 9912(a). I R. 254-55.

Second, the funding decision did not deprive plaintiffs of due process of law. Plaintiffs had no statutory or regulatory right to notice and a hearing because the right to notice and opportunity to be heard guaranteed by 42 U.S.C. § 2944(2) and 45 C.F.R. § 1067.2 before a CAA's application for refunding could be reduced or denied did not apply to cases of reduced appropriations. 45 C.F.R. § 1067.2-4(a). Plaintiffs had no constitutional right to notice and a hearing because they had no property interest in continued funding for the remainder of their program year beyond October 1, 1981, when Congress had chosen to dismantle the entire funding program. I R. 255-58.

Third, the funding of small CAAs for program years ending in fiscal year 1982 while denying large CAAs similar funding did not deprive plaintiffs of equal pro-

tection and was not arbitrary, capricious, or an abuse of discretion under 5 U.S.C. § 706(2)(a). I R. 12-18.[5]

For reasons that follow, we find that there is a serious question concerning the subject matter jurisdiction of the district court which must be addressed and is dispositive.[6]

II

The Tucker Act provides that the United States Claims Court has exclusive jurisdiction to render judgment upon any claim against the United States exceeding $10,000 "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). *See United States v. City of Kansas City*, 761 F.2d 605, 607-08 (10th Cir. 1985).[7] Exclusive jurisdiction therefore

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5. The district court also rejected plaintiffs' argument that defendants' refusal to use fiscal year 1981 funds for the purpose of funding SEK-CAP's program which continued into fiscal year 1982 violated Article 2, Section 3 of the United States Constitution and the Impoundment Control Act of 1974, 31 U.S.C. § 1400, *et seq.* I R. 258-60. Plaintiffs do not challenge this decision on appeal.

6. *See Tafoya v. Department of Justice*, 748 F.2d 1389, 1390 (10th Cir. 1984) ("Insofar as subject matter jurisdiction is concerned, it has long been recognized that a federal court must, *sua sponte*, satisfy itself of its power to adjudicate in every case and at every stage of the proceedings and the court is not bound by the acts or pleadings of the parties.").

7. The district courts have concurrent jurisdiction under 28 U.S.C. 1346(a)(2) with the Claims Court in those cases where the claim does not exceed $10,000:

> (a) The district court shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> . . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either

(Continued on following page)

rests in the Claims Court if three conditions are satisfied: (1) the action is against the United States; (2) the action seeks monetary relief in excess of $10,000; and (3) the action is founded upon the Constitution, federal statute, executive regulation, or government contract. *See Portsmouth Redevelopment and Housing Authority v. Pierce*, 706 F.2d 471, 473 (4th Cir. 1983). We are satisfied that plaintiffs' claim meets these criteria and that exclusive jurisdiction is thus in the Claims Court.

Plaintiffs' prayer requested two forms of relief. First, a declaratory judgment was sought that defendants' action in funding small CAAs for program years ending in fiscal year 1982 while denying large CAAs like SEK-CAP similar funding violated constitutional safeguards of due process and equal protection and statutory requirements guaranteeing minimum funding and urban-rural equity and prohibiting arbitrary and capricious conduct. Second, an injunction was requested essentially requiring defendants to keep available the funds plaintiffs allege they are entitled to for the remainder of their program year from October 1, 1981 to May 30, 1982 and to give them these funds.[8] In this connection we

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Footnote continued—

> upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. . . .

28 U.S.C. § 1346.

8. Plaintiffs' second prayer for relief sought

> [a] temporary restraining order, preliminary injunction and permanent injunction restraining and enjoining defen-

(Continued on following page)

note that the federal defendants were sued in their official capacities. I R. 63.

Although there is a conflict as to exactly what amount plaintiffs claim that SEK-CAP is entitled to for the additional eight months in funding, SEK-CAP did receive $114,222 for the period from June 1, 1981 to September 30, 1981. Plaintiffs are therefore seeking recovery of at least $228,444.[9]

Several courts have noted that "when the 'prime objective' or 'essential purpose' of the complaining party

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Footnote continued—

> dants from expending, obligating, returning to the treasury, or otherwise committing any funds available to them which legally could be used to continue the funding of plaintiffs' respective program years; requiring defendants to make an accounting to the court of all such available funds; requiring defendants to retain the necessary obligational authority after September 30, 1981, to provide such additional funding to plaintiffs as is ordered by the court; *requiring defendants to fund plaintiffs for their respective program years at the level approved by CSA* as described in paragraphs 14(a) and 14(b); restraining and enjoining defendants from denying funding to plaintiffs on an inequitable basis, or a basis that violates or fails to conform to relevant Constitutional, statutory or regulatory criteria or requirements; and restraining and enjoining defendants from further violations of Constitutional, statutory and regulatory requirements.

I R. 70 (emphasis added).

9. This figure assumes that the $114,222 grant awarded on June 1, 1981, represented an amount proportionate to the total expected grant for the entire program year. Under this approach, the $114,222 represented four months out of the program year (4/12) while $228,444 represented the remaining months in the program year (8/12), for a total grant for the entire program year of $342,666. This practice was followed in previous years in funding SEK-CAP.

Other evidence, however, suggests that plaintiffs expected to receive a total of between $439,000 and $469,000 for SEK-CAP's program year. *See* I R. 64 (amended complaint), 72-73 (affidavit). Under this evidence, plaintiffs apparently would claim that SEK-CAP is entitled to $324,778 or $354,778 in additional funding for the remaining eight months of its 1981 program year.

is to obtain money from the federal government (in an amount in excess of $10,000), the Claims Court's exclusive jurisdiction is triggered." *New Mexico v. Regan*, 745 F.2d 1318, 1322 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 2138 (1985); *see also Alamo Navajo School Board, Inc. v. Andrus*, 664 F.2d 229, 233 (10th Cir. 1981), *cert. denied*, 456 U.S. 963 (1982). A party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States. *See, e.g., United States v. City of Kansas City*, 761 F.2d at 608; *New Mexico v. Regan*, 745 F.2d at 1322; *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 824 (10th Cir. 1981); *Alamo Navajo School Board, Inc. v. Andrus*, 664 F.2d at 233.[10]

Although plaintiffs' first prayer seeks declaratory relief, the underlying purpose of the action was to obtain from the United States funds that SEK-CAP allegedly was due for the final eight months of its program year. We have held that similar claims fall within the exclusive jurisdiction of the Claims Court. For example, in *United States v. City of Kansas City*, a city claimed that it was arbitrarily and capriciously denied federal grant assistance and sought a judgment of over $2 million in monetary damages. Subsequently, "apparently realizing the Tucker Act problem, [the city] began to seek merely injunctive and declaratory relief." 761 F.2d at 608. We concluded that

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10. On appeal, plaintiffs state that by the complaint "SEK-CAP sought to restrain defendants from returning [fiscal year 1981] funds to the Treasury, (Complaint ¶VI-1, ROA8) and sought to require defendants to issue SEK-CAP's second installment from those funds. Brief for Appellants 10.

> beyond the City's shift in focus from monetary damages to declaratory and injunctive relief lies the simple reality that at both the onset of the suit and the time the case was submitted for summary judgment the City's aim was the same—the obtaining of the grant money. The mere characterization of what is ultimately a monetary claim as a suit for non-monetary relief cannot work to avoid the exclusive jurisdiction of the Claims Court.

*Id.* at 608-09.[11]

We feel that as in *United States v. City of Kansas City*, the plaintiffs' claim is within the exclusive jurisdiction of the Claims Court. In that case, the plaintiffs tried to request only injunctive and declaratory relief instead of monetary damages. Here, plaintiffs sought to require defendants to fund SEK-CAP for the remainder of its 1981 program year. I R. 70. Although this relief was sought by means of an injunction, "a plaintiff may not transform a claim for monetary relief into an equitable action simply by asking for an injunction that orders the payment of money." *New Mexico v. Regan*, 745 F.2d at 1322. In *New Mexico v. Regan*, the State sought to recover federal royalties used to pay windfall profits tax, and also requested an accounting and declar-

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11. *Amalgamated Sugar Co. v. Bergland*, 664 F.2d at 820-24, also supports our conclusion that the Claims Court has exclusive jurisdiction of plaintiffs' claim. In *Bergland*, plaintiffs sought a declaratory judgment in the district court that certain sugar was eligible for a federal price support program. A potential federal grant of $700,000 for storage payments turned on this eligibility determination. Plaintiffs did not make a claim for this grant in the district court but instead sought to have their eligibility determined. We held that plaintiff's claim was within the exclusive jurisdiction of the Claims Court because "Plaintiffs' ultimate aim in seeking a declaratory judgment was to obtain the grant money, an amount in excess of $10,000." *United States v. City of Kansas City*, 761 F.2d at 608.

atory relief. We held that the case was within the exclusive jurisdiction of the Claims Court because the State's "additional requests for an accounting and declaratory relief are merely incidental and subordinate to the basic suit for money." 745 F.2d at 1322.

Although the United States was not a named party in this action, the effect of suing defendants in their official capacities while seeking monetary relief is to make the action one against the United States. We have held in similar circumstances that when plaintiffs' "primary purpose is to fix the government's and not the [defendant] Secretary's liability . . . we must conclude that the suit is essentially one designed to reach money which the government owns." *New Mexico v. Regan*, 745 F.2d at 1322; *see also Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted) (quoting *Land v. Dollar*, 330 U.S. 731, 747 (1947), and *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949)) ("The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration . . . or if the effect of the judgment would be 'to restrain the the Government from acting, or to compel it to act.' "); *Portsmouth Redevelopment and Housing Authority v. Pierce*, 706 F.2d at 474 ("[B]oth because this is a suit against a federal official and any judgment recovered would expend itself on the public treasury, we construe this action as one against the United States for purposes of the Tucker Act.").

The Government argues that "[i]f plaintiffs' theory is that [SEK-CAP] had a contract with CSA by which CSA obligated itself to pay SEK-CAP a sum of money, in installments, their claim is if anything a Tucker Act

claim and exclusive jurisdiction lies in the United States Claims Court." Brief for the Appellees 25. We believe that plaintiffs' claim for additional funding for SEK-CAP's 1981 program year is apparently based on the theory that when CSA provided the $114,222 in funding on June 1, 1981 for the portion of its program year ending September 30, 1981, CSA obligated itself to provide additional funding for the remainder of SEK-CAP's program year from October 1, 1981 through May 30, 1982. Plaintiffs' complaint alleges that CSA approved SEK-CAP's funding for its entire 1981 program year. I R. 64-65. In their memorandum in opposition to defendants' motion to dismiss, plaintiffs alleged that the funding of large CAAs was done through "installments," with the second installment merely a "ministerial act" completing the funding for its entire program year which was guaranteed once the first installment was made so long as the large CAA complied with the terms and conditions of the grant. *Id.* at 198-200. On appeal plaintiffs repeatedly refer to the remaining funds for SEK-CAP's 1981 program year as a second "installment" to which it was entitled once SEK-CAP's grant application was approved and the first "installment" of $114,222 was paid on June 1. *See, e.g.*, Brief of Appellants 6-8. Hence we must treat plaintiffs' action as one primarily seeking funds for the remainder of SEK-CAP's 1981 program year on the basis of an alleged agreement that once its grant was approved and the $114,222 payment was made on June 1, such funds would be provided.

Jurisdiction of this case therefore rests in the Claims Court because the action is in essence against the United States, it seeks monetary relief in excess of $10,000, and it is based on an alleged agreement by CSA to fully fund SEK-CAP's 1981 program year once the $114,222

payment was made on June 1, 1981 for that part of SEK-CAP's program year ending on September 30, 1981 and on other claims premised on constitutional, statutory and regulatory grounds. We hold that the district court lacked jurisdiction to entertain this action. Thus we need not discuss the contentions of plaintiffs which challenge the district court's ruling against them on the merits.

III

Accordingly, we vacate the judgment of dismissal on the merits and remand the case to the district court with directions that the action be transferred to the United States Claims Court "in the interest of justice" under 28 U.S.C. § 1631.[12] *See, e.g., Portsmouth Redevelopment and Housing Authority v. Pierce*, 706 F.2d at 475; *Schulthess v. United States*, 694 F.2d 175, 179 (9th Cir. 1982); *Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971, 974 (5th Cir. 1981); *cf. Tafoya v. Department of Justice*, 749 F.2d at 1393; *State of New Mexico v. Regan*, 745 F.2d at 1323; *Keller v. Merit Systems Protection Board*, 679 F.2d 220, 223 (11th Cir. 1982).

IT IS SO ORDERED.

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12. Section 1631 provides as follows:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631.

## APPENDIX D

### 42 USC 2808 (now repealed)

**§ 2808. General provisions for financial assistance**—Component activities

(a) The Director may provide financial assistance to community action agencies for the planning, conduct, administration and evaluation of community action programs and components. Those components may involve, without limitation, other activities and supporting facilities designed to assist participants including the elderly poor—

(1) to secure and retain meaningful employment;

(2) to attain an adequate education;

(3) to make better use of available income;

(4) to provide and maintain adequate housing and a suitable living environment;

(5) to undertake family planning, consistent with personal and family goals, religious and moral convictions;

(6) to obtain services for the prevention of narcotics addiction, alcoholism, and the rehabilitation of narcotic addicts and alcoholics;

(7) to obtain emergency assistance through loans or grants to meet immediate and urgent individual and family needs, including the need for health services, nutritious food, housing, and employment-related assistance;

(8) to remove obstacles and solve personal and family problems which block the achievement of self-sufficiency;

(9) to achieve greater participation in the affairs of the community; and

(10) to make more frequent and effective use of other programs related to the purposes of this subchapter.

The Director may also provide financial assistance to other public or private nonprofit agencies to aid them in planning for the establishment of a community action agency.

**Use of agencies outside designated community action agencies**

(b) If the Director determines that a limited purpose project or program involving activities otherwise eligible under this section is needed to serve needs of low-income families and individuals in a community and no community action agency has been designated for that community pursuant to section 2790 of this title, or where a community action agency gives its approval for such a program to be funded directly through a public or private nonprofit agency or organization, the Director may extend financial assistance for that project or program to a public or private nonprofit agency which the Director finds is capable of carrying out the project in an efficient and effective manner consistent with the purpose of this subchapter.

**Rules and regulations**

(c) The Director shall prescribe necessary rules or regulations governing applications for assistance under this section to assure that every reasonable effort is made by each applicant to secure the views of local public

officials and agencies in the community having a direct or substantial interest in the application and to resolve all issues of cooperation and possible duplication prior to its submission.

**Systematic planning and implementation processes**

(d) After July 1, 1968, the Director shall require, as a condition of assistance, that each community action agency has adopted a systematic approach to the achievement of the purposes of this subchapter and to the utilization of funds provided under this part. Such systematic approach shall encompass a planning and implementation process which seeks to identify the problems and causes of poverty in the community, seeks to mobilize and coordinate relevant public and private resources, establishes program priorities, links program components with one another and with other relevant programs, and provides for evaluation. The Director may, however, extend the time for such requirement to take into account the length of time a program has been in operation. The Director shall also take necessary steps to assure the participation of other Federal agencies in support of the development and implementation of plans under this subsection.

**42 USC 2808(e)**

**Establishment of binding national priorities prohibited**

(e) In order to promote local responsibility and initiative, the Director shall not establish binding national priorities on funds authorized by this section, but the Director shall review each application for financial assis-

tance on its merits. Before extending financial assistance to a new community action agency under this section, and in determining the amount of and conditions on which such assistance shall be extended, the Director shall consider the extent and nature of poverty in the community and the probable capacity of the agency to carry out an effective program. In reviewing or supplementing financial assistance to a previously existing community action agency, the Director shall consider the progress made in carrying on programs by such agency.

## APPENDIX E

### 42 USC 2833(b) (now repealed)

(b) The Director shall establish criteria designed to achieve an equitable distribution of assistance under this subchapter within the States between urban and rural areas. In developing such criteria, he shall consider the relative number in the States or areas therein of: (1) low-income families, particularly those with children; (2) unemployed persons; (3) persons receiving cash or other assistance on a needs basis from public agencies or private organizations; (4) school dropouts; (5) adults with less than an eighth-grade education; (6) persons rejected for military service; and (7) poor persons living in urban places compared to the number living in rural places as determined by the latest reports of the Bureau of the Census.

# APPENDIX F

## 42 USC 2836(8) (now repealed)

(8) Consistent with the provisions of this chapter, the Director shall assure that financial assistance under this subchapter will be distributed on an equitable basis in any community and within any State so that all significant segments of the low-income population are being served.

# APPENDIX G

## 42 USC 2944 (now repealed)

### § 2944. Appeals, notice, and hearing

The Director shall prescribe procedures to assure that—

(1) special notice of and an opportunity for a timely and expeditious appeal to the Director is provided for an agency or organization which would like to serve as a delegate agency under subchapter II of this chapter and whose application to the community action agency has been wholly or substantially rejected or has not been acted upon within a period of time deemed reasonable by the Director;

(2) financial assistance under subchapter II of this chapter and part B of subchapter III of this chapter shall not be suspended for failure to comply with applicable terms and conditions, except in emergency situations, nor shall an application for refunding under sections 2808, 2809, or 2862 of this title be denied, unless the recipient agency has been given reasonable notice and opportunity to show cause why such action should not be taken; and

(3) financial assistance under subchapter II of this chapter and part B of subchapter III of this chapter shall not be terminated for failure to comply with applicable terms and conditions unless the recipient agency has been afforded reasonable notice and opportunity for a full and fair hearing.

# APPENDIX H

## 42 USC 2967 (now repealed)

### § 2967. Distribution of benefits between rural and urban areas

The Director shall adopt appropriate administrative measures to assure that benefits of this chapter will be distributed equitably between residents of rural and urban areas.

# APPENDIX I

## 42 USC 2971(b) (now repealed)

### § 2971b. Guidelines, etc.; publication in Federal Register

All rules, regulations, guidelines, instructions, and application forms published or promulgated pursuant to this chapter shall be published in the Federal Register at least thirty days prior to their effective date.

## APPENDIX J

### PL 97-51 § 133

SEC. 133. Notwithstanding any other provision of this joint resolution, such sums as may be necessary shall be available during fiscal year 1982 for close-out expenses of the Community Services Administration.

# APPENDIX K

## 42 USC 9911(e)

(e) Upon the enactment of this Act, the Director of the Office of Management and Budget is authorized to provide for termination of the affairs of the Community Services Administration. He shall provide for the transfer or other disposition of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with implementation of the authorities terminated by section 9912(a) of this title as necessary to effectuate the purposes of this chapter.

# APPENDIX L

## 45 CFR 1067.2 (now repealed)

### Subpart 1067.2—Denial of Application for Refunding (CSA Instruction 6730-1a)

AUTHORITY: Sections 213, 602, 604 of the Economic Opportunity Act of 1964, as amended; 81 Stat. 395, 78 Stat. 528, 81 Stat. 715 (42 U.S.C. 2796, 2942, 2944).

SOURCE: 43 FR 29123, July 6, 1978, unless otherwise noted.

#### § 1067.2-1 Applicability of this subpart.

This subpart applies to all public and private grantees financially assisted under sections 221, 222, and 312 of the Community Services Act of 1974, as amended, if the assistance is administered by the Community Services Administration.

#### § 1067.2-2 Purpose.

This subpart establishes rules and review procedures for the denial of a current grantee's application for refunding under section 221, 222, or 312 of the act. It does not apply to any administrative action of CSA based upon any violation, or alleged violation, of title VI of the Civil Rights Act of 1964. In the case of such violation or alleged violation, the provisions of 45 CFR part 1010 (CSA Instruction 6004-01a) shall apply.

#### § 1067.2-3 Definitions.

As used in this subpart—

(a) The term "CSA" means the Community Services Administration.

(b) The term "Director" means the Director of the Community Services Administration.

(c) The term "responsible CSA official" means the Director, Deputy Director, and any other official who is authorized to make the grant in question.

**§ 1067.2-4 Procedures.**

(a) The procedures set forth in this subpart shall apply only when a grantee's application for refunding is denied or reduced to a level at least 20 percent below its current level of operations (programs-in-place). These procedures apply only to grants under sections 221, 222, and 312 of the act and apply only to denial or reduction of refunding as based on circumstances related to the particular grant, such as ineffective or improper use of Federal funds or noncompliance with CSA directives and grant conditions. Furthermore, these procedures do not apply to grants funded under section 222(a) which have specifically been identified as one time only fundings by either the relevant policy statement or special conditions. These procedures do not apply to reductions based on general policy, reduced appropriations or in instances where regardless of a grantee's current level of operations (programs-in-place), its application for refunding is not reduced by 20 percent or more. (The reduction of a grantee's funding by at least 20 percent as discussed above shall hereinafter be included in and referred to as denial of application for refunding.)

(b) CSA shall notify the grantee in writing of an intended denial of an application for refunding as far in advance of the end of the grantee's current program year as possible. This notice shall be signed by the responsible CSA official or, in the case of regionally administered

grants, the regional director of the grantee's region. This notice shall state that CSA has made a tentative decision to deny the grantee's application for refunding and shall state the reasons for this decision. Finally, the notice shall offer the grantee an opportunity to show cause why CSA should not deny refunding through the submission of written material to and/or an informal meeting with the responsible CSA official, or his designee. Any request for such and informal meeting must be made within 30 days of receipt of this notice.

(c) If the grantee requests an informal meeting as discussed in paragraph (b) of this section, it shall be scheduled as soon as possible but not less than 14 days after the date of the notice of denial of the application for refunding. If, without fault on the part of the grantee, its operating funds become exhausted before this informal meeting has taken place, it shall be afforded sufficient additional funding to maintain its existing level of program operations until the responsible CSA official has reached a decision on its refunding.

(d) This informal meeting shall be held in Washington, D.C., in the appropriate regional office, or in the city or county in which the grantee is located, at the discretion of CSA.

(e) If the official who conducts the meeting is not the responsible CSA official, he shall forward his recommendation, together with any written material submitted by the grantee, to the responsible CSA official. After conducting this meeting or receiving the recommendation of the CSA official who did conduct the meeting, the responsible CSA official shall inform the grantee in writing of his decision and the reasons for that decision.

**§ 1067.2-5 Right to counsel and travel expenses.**

(a) In all proceedings under this subpart, the grantee and CSA shall have the right to be represented by counsel or other authorized representatives. If the grantee does not have an attorney on its staff, the grantee's Board of Directors will be authorized to transfer sufficient funds from its current operating grant to pay reasonable attorney's fees. However, such fees shall not exceed $100 per day without the express written approval of CSA.

(b) If this meeting is held outside the city or county in which the grantee is located, travel and per diem expenses may be paid from the grantee's current operating grant for an attorney and two other representatives of the grantee to attend the meeting. Such travel and per diem expenses shall conform to applicable CSA travel regulations (CSA Instructions 6910-1a and 6910-2c found in 45 CFR 1069.3 and 1069.4).

## APPENDIX M

### 45 CFR 1067.30-5(8) (now repealed)

(8) *Item 5—Program year.* This section will show the grantee's program year. This period will not necessarily agree with the period for which funds are awarded. However, whenever possible the grantee's fundings will coincide with the grantees program year.

# APPENDIX N

## 42 USC 2000(d)

**Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin**

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(2)

No. 88-1088

FILED
APR 3
JOSEPH F. SPANIOL, JR.

# In the Supreme Court of the United States

OCTOBER TERM, 1988

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WALLACE ROGERS, SOUTHEAST KANSAS COMMUNITY ACTION PROGRAM, INC., AND THE ECONOMIC OPPORTUNITY FOUNDATION, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

WILLIAM C. BRYSON
*Acting Solicitor General*
JOHN R. BOLTON
*Assistant Attorney General*
RICHARD G. TARANTO
*Assistant to the Solicitor General*
WILLIAM KANTER
ROBERT D. KAMENSHINE
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

39pp

## QUESTIONS PRESENTED

1. Whether the Claims Court correctly dismissed petitioners' claims against the United States under the Fifth Amendment's guarantees of equal protection and due process and under Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d.

2. Whether the Federal Circuit correctly rejected on the merits petitioners' several challenges to the decision of the federal Community Services Administration—made in the course of winding up its affairs before the agency terminated its functions at the end of Federal Fiscal Year (FFY) 1981—not to fund the two petitioner community action agencies for the part of their 1981 program years that extended into FFY 1982.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

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WALLACE ROGERS, SOUTHEAST KANSAS COMMUNITY ACTION PROGRAM, INC., AND THE ECONOMIC OPPORTUNITY FOUNDATION, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. A1-A2) is unreported. The opinion of the United States Claims Court (Pet. App. A3-A25) is reported at 14 Cl. Ct. 39. The opinion of the United States District Court for the District of Kansas dismissing petitioners' complaint (App., *infra*, 1a-17a) is unreported. The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. A26-A39) ordering the case transferred to the Claims Court is reported at 766 F.2d 430.

### JURISDICTION

The judgment of the Federal Circuit (Pet. App. A1) was entered on September 28, 1988. The petition for a writ of

certiorari was filed on December 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

As the successor to the Office of Economic Opportunity, the Community Services Administration (CSA) distributed funds to local community action agencies (CAAs) to serve low-income citizens. 42 U.S.C. 2790(a) (1976); Pet. App. A4, A27. On August 13, 1981, Congress enacted the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 357, which, effective October 1, 1981, terminated CSA, repealed the statute (42 U.S.C. 2808 (1976)) under which funds for CAAs were appropriated, and substituted a program of block grants to States. Pet. App. A5, A28. Petitioners, two large CAAs and one of their low-income clients, challenge the manner in which CSA distributed funds in terminating its activities. *Id* at A3.

1. Many CAAs, including petitioners, were budgeted according to program years that did not coincide with federal fiscal years (FFY). In 1975, CSA adopted a plan for distributing funds that distinguished small CAAs (those receiving less than $300,000 annually) from large CAAs (those receiving more than that amount). Pet. App. A4, A27-A28. Small CAAs (by far the majority) received their funding in one yearly grant taken from one federal fiscal year's appropriations. Large CAAs, by contrast, generally were funded by two separate grants: one for the period from the beginning of the CAA's program year to September 30th (the end of the federal fiscal year); another that covered the period from October 1st (the beginning of the subsequent federal fiscal year) to the end of the CAA's program year. Pet. App. A4-A5, A28.[1]

[1] The plan was initially established to help provide funds for the large CAAs during and after a period of reduced CSA appropriations. Pet. App. A4-A5.

When Congress ended the program of grants to CAAs and substituted a block grant program in OBRA (Pet. App. A5, A28-A29),[2] CSA had six weeks in which to wind up its affairs. Rather than adopt a new fund-distribution method, CSA chose to maintain its established funding pattern during its waning days. Pet. App. A7, A29-A30; App., *infra,* 15a. CSA made that decision with the aim of achieving an equitable distribution of the remaining funds while minimizing disruption. App., *infra,* 15a.

Most small CAAs already had been funded for their full program years at the time Congress enacted OBRA. Pet. App. A29; App., *infra,* 14a. The few remaining small CAAs whose applications were pending on August 13, 1981, were given their full funding. Pet. App. A29-A30. The large CAAs also were funded according to the traditional pattern, but that meant less than full funding for many of them. *Id.* at A30. Such CAAs could be financed only to the extent that FFY 1981 appropriated funds existed. Fiscal year 1982 funds, which ordinarily would have been the source of large CAAs' second infusion of revenue, had not been appropriated for CSA. Moreover, FFY 1981 funds that remained after funding of the small CCAs were used to pay administrative expenses of closing the agency (*e.g.,* annual leave and termination benefits for CSA's employees) or set aside to provide for contingencies pursuant to the Anti-Deficiency Act, 31 U.S.C. 1512(c)(1)(a); some of this money then reverted to the United States Treasury on the final day of FFY 1981.

2. Petitioners filed this lawsuit in federal district court in Kansas on September 30, 1981, one day before the end

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[2] The State of Kansas, where the petitioner CAAs are located, elected to participate for FFY 1982. App., *infra,* 5a. Under the program, participating States had discretion to decide how to use federal antipoverty funds, including discretion to make grants to former CAAs. *Ibid.*

of FFY 1981. Pet. 14. They challenged the lack of funding on a variety of statutory and constitutional grounds. After denying requests for a temporary restraining order and preliminary injunction, the district court granted the government's motion to dismiss. *Ibid.*; App., *infra,* 4a. The court first held that petitioners' suit was premature because the CAAs at that time were eligible to receive money under the block grant program that replaced direct CSA funding. App., *infra,* 4a-5a. The court went on, however, to consider and to reject petitioners' claims on the merits.

The court concluded that CSA's manner of winding up violated neither 42 U.S.C. 2812(a) (1976), which set a funding minimum for each CAA, nor 42 U.S.C. 2967 (1976), which required disbursement of funds equitably between rural and urban areas. App., *infra,* 5a-6a. The court explained that those provisions were repealed effective the same date that CSA ceased funding the petitioner CAAs (October 1, 1981, the beginning of FFY 1982). *Ibid.* Similarly, the court ruled that, because the CSA program was abolished entirely, the statutory and regulatory requirements of notice and a hearing for denial of funding or suspension of funding *under the program* (42 U.S.C. 2944(2) (1976); 45 C.F.R. Subpt. 1067.2 (1980)) were not applicable to this case and hence were not violated; moreover, the regulations expressly excluded cases of reduced appropriations (45 C.F.R. 1067.2-4 (1980), an exclusion that covered complete elimination of appropriations. App., *infra,* 7a. The court concluded that, because petitioners had "no legitimate claim of entitlement to funds direct from the federal government during fiscal year 1982" in the absence of any appropriation of such funds to the CSA program (*id.* at 8a), petitioners likewise had no property interest, for procedural due process purposes, in receiving funds past the end of FFY 1981. *Id.* at 8a-9a.[3]

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[3] The next two contentions addressed and rejected in the court's opinion, but not raised in the petition for a writ of certiorari, were

Petitioners also contended that CSA's distribution violated a statutory requirement that funds be distributed equitably, deprived them of equal protection, and was arbitrary and capricious in violation of the Administrative Procedure Act (APA). App., *infra,* 11a. The court rejected all of those contentions, finding that, although a *pro rata* distribution among all CAAs might have been fairer (*id.* at 13a), the policy followed by CSA in its final days was entirely rational. The policy continued the funding scheme that had been in place since 1975, and the *pro rata* alternative would have required CSA to retrieve funds from the many small CAAs that had already been fully funded before the enactment of OBRA on August 13, 1981. *Id.* at 13a-16a.

3. On appeal, the Tenth Circuit held that the case fell within the Claims Court's exclusive jurisdiction and, without addressing the merits, therefore ordered the case transferred pursuant to 28 U.S.C. 1631. Pet. App. A26-A39. The court reasoned that the Claims Court had exclusive jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), if three conditions were met: "(1) the action is against the United States; (2) the action seeks monetary relief in excess of $10,000; and (3) the action is founded upon the Constitution, federal statute, executive regulation, or government contract." Pet. App. A33. The court of appeals found that all three conditions were met in this case.

The court explained that the complaint in fact sought money from the United States, although in form it sought only declaratory and injunctive relief—namely, a declara-

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that CSA's actions constituted an illegal impoundment of unexpended FFY 1981 funds, in violation of U.S. Const., Art. 2, § 3, and the Impoundment Control Act of 1974, 2 U.S.C. 681 *et seq.*, and violated the agency's regulation stating that "whenever possible the grantee's fundings will coincide with the grantee's program year" (45 C.F.R. 1067.30-5(8) (1980)). App., *infra,* 9a-11a.

tory judgment that CSA's funding decision was unlawful on various grounds, and an injunction requiring the defendant federal officials (the head of CSA and the head of the Office of Management and Budget) to pay to petitioner Southeast Kansas Community Action Program, Inc. (SEK-CAP), the balance (eight months' worth) of its program-year funds. Pet. App. A33-A34.[4] The amount requested was in excess of $200,000. *Id.* at A34. The court of appeals explained that, because the underlying purpose of the suit was to obtain more than $10,000 in money from the federal government, the Claims Court had exclusive jurisdiction under the Tucker Act, and that jurisdiction could not be avoided simply "by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief." Pet. App. A34-A35. The court also observed that, "[a]lthough the United States was not a named party in this action, the effect of suing defendants in their official capacities while seeking monetary relief is to make the action one against the United States." Pet. App. A37 (citing *Dugan* v. *Rank,* 372 U.S. 609, 620 (1963); *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682, 704 (1949); *Land* v. *Dollar,* 330 U.S. 731, 738 (1947)). Finally, the court determined that, in addition to the constitutional, statutory, and regulatory grounds, the action was based on a contract: it sought "funds for the remainder of SEK-CAP's 1981 program year on the basis of an alleged agreement that once its grant was approved and the $114,222 payment was made on June 1, such funds would be provided." Pet. App. A38-A39. Accordingly, there was exclusive Claims Court jurisdiction because the action was

[4] Petitioner Economic Opportunity Foundation (EOF), the second CAA plaintiff in the district court, was not a party to the appeal. Pet. App. A29 n.4. Petitioner Wallace Rogers was a low-income resident of Kansas served by SEK-CAP. *Id.* at A29.

"in essence against the United States," sought "monetary relief," and was based on an "alleged agreement" and on "other claims premised on constitutional, statutory and regulatory grounds." *Ibid.*

4. After the case was transferred and an amended complaint was filed against the United States by all three petitioners, the Claims Court granted the government's motion to dismiss and for summary judgment.[5] The court concluded that the failure to provide the two CAAs funding for the period after September 30, 1981, did not breach an implied-in-fact contract and was not arbitrary and capricious (Pet. App. A10-A18) and did not violate statutory and regulatory guarantees of fair procedure and equitable treatment (*id.* at A20-A21). The court also ruled that the remaining claims were outside its jurisdiction—the CAA petitioners' Fifth Amendment procedural due process and equal protection claims (Pet. App. A22-A23), and petitioner Rogers' statutory race discrimination claim (*id.* at A23-A24).

On the merits, the court began by explaining that the dispute came down to whether funds were available to pay the two CAAs for the part of their 1981 program years extending into FFY 1982. Pet. App. A11. Plainly no FFY 1982 funds were available, because CSA, which was terminated on October 1, 1981, received no FFY 1982 appropriations. *Id.* at A12. The court also concluded that there was no error in CSA's decision not to distribute to the petitioner CAAs any of the FFY 1981 funds remaining in the agency on August 13, 1981, the day the CSA-dismantling statute was enacted. With those funds, CSA decided, in

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[5] Although petitioner EOF had not appealed the final judgment entered against it by the district court in Kansas, the government did not object on res judicata grounds to EOF's renewing its claim in the Claims Court.

accord with its past practice, to continue to fund small CAAs for their full program years but to provide funding only up to September 30, 1981, for the large CAAs, expecting the FFY 1982 block grant funds to make up the balance of the large CAAs' program years. Pet. App. A12. After the re-funding of all small CAAs in petitioners' region, $1.4 million in unobligated funds remained. *Id.* at A13. Rather than distributing those funds to the large CAAs in the region, CSA decided, in late September 1981, to use the funds to cover expenses of terminating the agency and to serve, pursuant to the Anti-Deficiency Act, as a reserve to meet obligations of the agency that might come to light later. *Ibid.* On September 30, 1981, $8 million of CSA appropriations, the remainder of all funds held for close-out and Anti-Deficiency Act purposes, lapsed into the Treasury. *Ibid.*

The Claims Court held that CSA's decisions after August 13, 1981, regarding the distribution of the FEY 1981 funds had a rational basis and were not arbitrary or capricious or an abuse of discretion. First, continuing the small CAA/large CAA funding pattern was rational: CSA could not fully eliminate the distinction between small and large CAAs without retrieving already distributed funds; the existing pattern had been established since 1975; CSA reasonably anticipated that FFY 1982 block grant funds would fill the gap for large CAAs;[6] and CSA determined that there was insufficient time and money to develop a new funding pattern in the waning months of CSA's existence, without unduly interfering with the orderly close-out. Pet. App. A14-A15. Second, the transfer of certain funds to the contingency reserve was specifically author-

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[6] In fact, as petitioner SEK-CAP acknowledged in its brief in the Tenth Circuit (at 15), SEK-CAP did receive a block grant from the State of Kansas for FFY 1982.

ized by the Anti-Deficiency Act, 31 U.S.C. 1512(c)(1)(a), and the amount CSA set aside for that purpose was hardly excessive. Pet. App. A15-A16. Third, CSA acted reasonably in setting aside certain funds for administrative close-out costs; until October 1, 1981, the CSA director, who was concerned about the need to meet the agency's obligations to its employees, had solid grounds to believe that Congress would not appropriate any additional money to cover those costs. *Id.* at A16-A17. The court concluded: "Faced with limited time and money, CSA attempted to dole out its resources in such a way as to protect its employees and at the same time to fund as many CAAs as possible." *Id.* at A17. See also *id.* at A14 ("the evidence suggests that CSA made every effort to fund all CAAs to the maximum degree possible while at the same time attempting to attend to an orderly close-out").

The court similarly rejected the breach-of-contract claim that there were "available" FFY 1981 funds that had to be given to the petitioner CAAs: "The fact that for the past two years CSA had sufficient funds available to pay plaintiffs' second grants from * * * funds remaining from the preceding FFY, does not obligate CSA to do so in this case." Pet. App. A17-A18. Moreover, the distribution of FFY 1981 funds to small CAAs and the application of the remaining funds to termination expenses and to an Anti-Deficiency Act contingency reserve were "within CSA's discretion." Pet. App. A18. Hence, the court concluded: "At the close of FFY 1981, because of these obligations, there were not sufficient * * * funds available with which to fund [petitioners]." *Ibid.*[7]

[7] The Claims Court also rejected petitioners' contention, under 42 U.S.C. 2971b (1976) (requiring publication of all rules, regulations, guidelines, and application forms), that the "failure to publish specific guidelines in the Federal Register concerning the mechanics of the split funding policy" rendered it void in this case. Pet. App. A18-A19.

The Claims Court next rejected petitioners' claims of statutory and regulatory violations. First, the court held that CSA did not violate 42 U.S.C. 2944 (1976) and 45 C.F.R. 1050.115-1 to 1050.115-8 (1980), which required notice and an opportunity to be heard when re-funding was "denied" or when funding was "terminated." See Pet. App. A20. Petitioners conceded that re-funding had not been denied (*ibid.*); and the court explained that there had been no "termination of funding," because "[o]n the date the second grant payment was due * * *, CSA did not have any funds available," and hence "[t]he condition precedent to the [petitioners'] contract with CSA—the availability of funds—did not occur" (*ibid.*). Second, the court held that the statutory requirements of equitable distribution of funds between rural and urban areas, 42 U.S.C. 2967, 2833(b) (1976), were not violated. All CAAs received full funding during FFY 1981; and on the day that FFY 1982 began, the cited statutes were repealed. Pet. App. A21.[8]

The Claims Court then determined that it lacked jurisdiction under the Tucker Act over the petitioners' due process and equal protection claims and over petitioner Rogers' race discrimination claim under 42 U.S.C.

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Although the court stated that "the details of the policy probably should have been published," it pointed out that "not only did [petitioners] have knowledge of a policy that had been going on for six years, but [they] * * * initially benefited from the policy." *Id.* at A19. The court also pointed out that, "[r]egardless, in this case, properly promulgated CSA regulations [45 C.F.R. 1067.30-5(8) (1980)], while expressing a preference for program year funding, effectively state[d] a policy that CSA funding might not coincide with the grantee's program year." Pet. App. A19.

[8] The court also rejected petitioners' argument that CSA violated the regulation directing that funding should coincide with program years "whenever possible." Pet. App. A21-A22. Petitioners do not renew that claim in this Court.

2000d. Pet. App. A22-A24. With respect to the constitutional claims, the court explained that since the Tucker Act is merely jurisdictional and does not grant substantive rights, it furnished jurisdiction only if the constitutional guarantees relied on by petitioners mandate monetary compensation. Pet. App. A22. The court found that it lacked jurisdiction over the procedural due process and equal protection claims because "these components of the Fifth Amendment standing alone do not mandate payment of monetary damages." Pet. App. A23. The court found that it lacked jurisdiction over petitioners Rogers' statutory claim of race discrimination for a different reason. The court stated that "[c]laims of racial discrimination based upon a statute may only be brought in a United States District Court." *Id.* at A23-A24.[9]

5. The Federal Circuit affirmed. Pet. App. A1-A2. It found that the Claims Court had convincingly explained that CSA, in "facing the uncommon requirement to permanently close itself down, had acted in all respects within its discretion and in accordance with law." *Id.* at A2. The court of appeals further ruled that the Claims Court "was also correct in its determination that it had no jurisdiction over the due process, equal protection, and discrimination claims." *Ibid.*

## ARGUMENT

1. Petitioners challenge the Claims Court's holding that it lacked jurisdiction over petitioners' equal protection, due process, and 42 U.S.C. 2000d claims. Whatever

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[9] Finally, the Claims Court rejected petitioners' claim that CSA's failure to expend its entire FFY 1981 appropriation, and its allowing of $8 million to revert to the Treasury, violated the Impoundment Control Act of 1974, 2 U.S.C. 681 *et seq.* Pet. App. A24. Petitioners do not raise that issue before this Court.

the correctness of that holding,[10] we believe that petitioners' challenge does not merit this Court's review. The

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[10] The Tucker Act "does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan,* 424 U.S. 392, 398 (1976). See *United States* v. *Mitchell,* 463 U.S. 206, 216 (1983). The Act, instead, is a limited waiver of sovereign immunity for substantive rights "found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.' " *Mitchell,* 463 U.S. at 216 (quoting 28 U.S.C. 1491). See *Army & Air Force Exchange Service* v. *Sheehan,* 456 U.S. 728, 734 (1982). The "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *Testan,* 424 U.S. at 400 (quoting *Eastport S.S. Corp.* v. *United States,* 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967)).

How those principles apply in this case depends on whether the required pay-mandating provisions must be the provisions creating the allegedly breached duty (here, the Fifth Amendment due process clause and 42 U.S.C. 2000d) or whether it is sufficient that the program-creating statute itself (here, the CSA statute) is pay-mandating. Even if the latter approach is correct (as the government has maintained in other cases), however, it remains unclear whether the CSA statute was pay-mandating in the sense required for the Tucker Act. Cf. *Bowen* v. *Massachusetts,* 108 S. Ct. 2722, 2738 n. 42 (1988) (questioning pay-mandating character of Medicaid statute). The Claims Court's jurisdiction over all three claims at issue is, accordingly, at least uncertain.

If the provisions creating the allgedly breached duty must themselves be pay-mandating, then the Claims Court was correct, because the due process clause and 42 U.S.C. 2000d do not mandate compensation by the federal government. As to the due process clause, see *Clark* v. *Library of Congress,* 750 F.2d 89, 103 n.31 (D.C. Cir. 1984) ("The courts have uniformly held that jurisdiction under the 'founded upon the constitution' grant of the Tucker Act is limited to claims under the 'takings clause' of the Fifth Amendment."); *Clemente* v. *United States,* 766 F.2d 1358, 1363 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); *Radin* v. *United States,* 699 F.2d 681, 685 n.8 (4th Cir. 1983); *Jaffee* v. *United States,* 663 F.2d 1226, 1230-1231 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982); *Duarte* v. *United States,* 532

jurisdictional ruling does not conflict with the decision of any other court of appeals[11] and raises no question of general importance. Moreover, the lower courts' rulings on the merits of petitioners' other claims effectively dispose of the three unreviewed claims, showing them to be insubstantial.

Thus, it is clear from the district court's statutory and constitutional due process rulings (App., *infra,* 7a-9a) and from the Claims Court's rulings on the statutory and breach-of-contract claims (Pet. App. A17-A21) that the petitioner CAAs had no property interest in funding past the end of FFY 1981. Their hope of receiving a second

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F.2d 850, 851-852 (2d Cir. 1976). As to 42 U.S.C. 2000d, the discussion at pages 14-15, *infra,* shows that the provision does not impose a compensation obligation on the federal government for its own discrimination independent of discrimination by a recipient of federal funds.

The Claims Court gave a different reason for its conclusion that it had no jurisdiction over the claim under 42 U.S.C. 2000d. It ruled that the district courts have exclusive jurisdiction over statutory race discrimination claims, pointing to 28 U.S.C. 1343. Pet. App. A23. That provision, however, which grants the district courts jurisdiction over certain statutory civil rights claims, does not declare such jurisdiction to be exclusive. Moreover, the decisions cited by the Claims Court (*ibid.*) ultimately rely on this Court's decision in *Brown* v. *GSA,* 425 U.S. 820 (1976), which holds only that *employment* discrimination claims against the federal government may be brought exclusively under the specific jurisdictional provisions of Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.

Whatever the correct conclusion about Claims Court jurisdiction over the statutory race discrimination claim, however, that claim, for reasons stated in the text, is wholly insubstantial.

[11] The Tenth Circuit's determination that this case fell within the exclusive jurisdiction of the Claims Court meant only that, if *any* court had jurisdiction to award monetary relief against the United States on the basis of petitioners' allegations, the Claims Court did. Thus, the Tenth Circuit decision does not conflict with the decision below.

grant payment from additional funds, just as it did not support a claim for denial of statutorily mandated due process, would not support a parallel claim of a Fifth Amendment due process violation. See *Richardson* v. *Belcher,* 404 U.S. 78, 80-81 (1971). Similarly, it is clear from the district court's APA and equal protection rulings (App., *infra,* 11a-16a) and from the Claims Court's APA rulings (Pet. App. A14-A17) that CSA's funding decisions were entirely rational (and not race-based). Hence, there is no need for further litigation of petitioners' equal protection claim. See *Bowen* v. *Gilliard,* 107 S. Ct. 3008, 3015 (1987).

Petitioner Rogers' claim of race discrimination under Section 601 (Title VI) of the Civil Rights Act of 1964, 42 U.S.C. 2000d, also is insubstantial. That provision declares: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Thus, the provision prohibits only the recipients of federal funds from discriminating; while the federal government might have to cut off funds from a recipient who is discriminating (42 U.S.C. 2000d-1), Section 601 does not impose any independent non-discrimination obligation on the federal government itself—where no recipient of federal funds is alleged to discriminate. See *Soberal-Perez* v. *Heckler,* 717 F.2d 36 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984); compare Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (barring discrimination "under any program or activity receiving Federal financial assistance *or* under any program or activity conducted by any Executive agency or by the United States Postal Service" (emphasis added)). Here, Rogers' claim focuses only on the federal agency's allegedly discriminatory decision, in concluding its opera-

tions, to continue to differentiate between large and small CAAs instead of adopting a new *pro rata* method. The claim thus falls outside the scope of Section 601.

Rogers' Title VI claim is insubstantial for another reason as well. Rogers does not allege intentional discrimination.[12] Yet a majority of this Court has stated that discriminatory intent is required for a violation of 42 U.S.C. 2000d. See *Guardians Ass'n* v. *Civil Service Comm'n,* 463 U.S. 582, 610 (1983) (Powell, J., concurring in the judgment); *id.* at 612-613 (O'Connor, J., concurring in the judgment); *id.* at 639-642 (Stevens, J., dissenting). As noted, both the district court and the Claims Court found that CSA's funding decisions were supported by rational policies unrelated to race.

In short, the constitutional claims and the statutory racial discrimination claim have no foundation independent of those already addressed and rejected. In these circumstances, there is no reason for this Court to review the Claims Court's holding that it had no jurisdiction over those claims.[13] For the same reason, review is not warranted of petitioners' contention that, assuming that the

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[12] Petitioner Rogers "alleges that black people suffered disproportionately under the split funding policy" in that "[t]he practical effect of the policy of CSA was to allow rural community action agencies, which were generally small rural and white, to continue through the transition to the block grant funding program without any problems" whereas "urban agencies and large rural agencies having significant segments of the black population among their constituents and management staff were faced with a difficult situation." Pet. 17-18.

[13] We note, too, that one of the two CAA petitioners, EOF, did not appeal from the final judgment entered against it in the district court of Kansas (see notes 4, 5, *supra*) and that the claims of damages by petitioner SEK-CAP and its client petitioner Rogers are weakened by the fact that SEK-CAP obtained block grant funding for its program in FFY 1982 (see note 6, *supra*).

Claims Court lacked jurisdiction over the three claims, it should have transferred them to the district court under 28 U.S.C. 1631: it is not "in the interest of justice" (28 U.S.C. 1631) to transfer for additional litigation claims that are insubstantial and that have effectively been adjudicated under other rubrics. See *Zinger Constr. Co.* v. *United States,* 753 F.2d 1053, 1055 (Fed. Cir. 1985).[14] In sum, review of the Claims Court's dismissal of the equal protection, due process, and Title VI claims is not warranted.[15]

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[14] Relevant to the possibility of transfer is the question whether the district court in Kansas could hear any of the claims at issue. This Court recently held in *Bowen* v. *Massachusetts,* 108 S. Ct. at 2740, that a district court had jurisdiction to reverse the decision of the Secretary of Health and Human Services not to reimburse a State for its expenditures under the Medicaid program. Although the scope of the ruling is not clear, the case involved a claim under a statute that expressly commanded the payment of money in specified circumstances, in the context of a continuing financial relationship between the federal government and a State. In the present case, the claims at issue were made not under a pay-directing provision of the CSA statute itself, but under the Constitution and Title VI; moreover, there was no continuing financial relationship between CSA and the CAAs, because the CSA program was repealed as of the end of FFY 1981. Whether *Bowen* would support jurisdiction in the district court in Kansas is, accordingly, uncertain. In addition, it is by no means clear that the district court could today entertain a request for an injunction directing the payment of FFY 1981 funds that are no longer available. Cf. *Reeside* v. *Walker,* 52 U.S. (11 How.) 272, 290-291 (1850) (under U.S. Const., Art. I, § 9, Cl. 7, courts cannot order payment of funds unless appropriated by Congress for that purpose).

[15] If this Court were to conclude otherwise, we suggest that an appropriate disposition would be to vacate the decision of the Federal Circuit and remand the case with instructions to remand to the Claims Court for reconsideration of its jurisdictional determinations in light of our present filing and in light of this Court's decisions in *Christianson* v. *Colt Industries Operating Corp.,* 108 S. Ct. 2166 (1988), and *Bowen* v. *Massachusetts, supra.* In *Colt Industries,* the Court held, among other things, that where a case is transferred, law-of-the-case

2. Petitioners also ask this Court to review the lower courts' rejection of a number of their challenges on the merits. For the reasons given by the Claims Court, however (see pages 7-10, *supra*), those challenges were correctly rejected. Moreover, petitioners do not suggest that the rejection of their claims conflicts with any decision of this Court or of any other court. Finally, there is no continuing significance to the issues, as they concern the manner in which one federal agency, now long defunct, chose to wind up its affairs.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General*
JOHN R. BOLTON
*Assistant Attorney General*
RICHARD G. TARANTO
*Assistant to the Solicitor General*
WILLIAM KANTER
ROBERT D. KAMENSHINE
*Attorneys*

APRIL 1989

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principles require that, "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." 108 S. Ct. at 2179.

**APPENDIX**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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Civil Action No. 81-4212

WALLACE ROGERS; SEK-CAP, INC., AND
ECONOMIC OPPORTUNITY FOUNDATION, PLAINTIFFS

*v.*

DWIGHT INK, DIRECTOR OF THE COMMUNITY SERVICES
ADMINISTRATION; AND DAVID STOCKMAN, DIRECTOR OF THE
OFFICE OF MANAGEMENT & BUDGET, ET AL., DEFENDANTS

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[Filed Aug. 24, 1982]

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**MEMORANDUM AND ORDER**

This is an action for declaratory, injunctive and other relief brought on behalf of the Southeast Kansas Community Action Program and the Economic Opportunity Foundation, Inc., two community action agencies, and by Wallace Rogers, who is a black, low-income resident of Pittsburg, Kansas, who participates and benefits from the programs operated by the Southeast Kansas Community Action Program. Plaintiffs seek to compel the Director of the Community Services Administration, and David Stockman, the Director of the Office of Management and Budget, to temporarily and permanently fund the operations of the Southeast Kansas Community Action Program and the Economic Opportunity Foundation.

Southeast Kansas Community Action Program is a non-profit corporation which was formed pursuant to § 210 of the Economic Opportunity Act of 1964. 42 U.S.C. § 2790. The Southeast Kansas Community Action Program serves Allen, Montgomery, Labette, Bourbon, Lynn, Crawford and Cherokee Counties in Kansas.

Plaintiff Economic Opportunity Foundation, Inc. is a non-profit corporation also organized pursuant to § 210 of the Economic Opportunity Act of 1964. The Economic Opportunity Foundation serves primarily Wyandotte County, Kansas. Both agencies allegedly serve the needs of the low-income populations of these counties. For the past several years, it is alleged these community action programs have received funding from the federal government.

Plaintiff Wallace Rogers is a 66-year old black man residing in Pittsburg, Kansas. He is alleged to be a low-income person who participates in the programs operated by the Southeast Community Action Program.

Defendant Dwight Ink is sued in his official capacity as Director of Community Services Administration. Defendant Ink is responsible for awarding and administering grants of money authorized under the Economic Opportunity Act. His responsibility is to administer all provisions of the Economic Opportunity Act as they relate to these plaintiffs.

Defendant David Stockman is sued in his official capacity as the Director of the Office of Management and Budget. Following the enactment of the Omnibus Reconciliation Act of 1981, David Stockman is the successor in authority to Dwight Ink as regards these funds and these community action agencies.

I

The Economic Opportunity Act of 1964 authorized the establishment of an agency within the federal government

called the Community Services Administration. The Community Services Administration administers the policies of the Economic Opportunity Act. Specifically, the Community Services Administration funds community action agencies which serve low-income citizens in an effort to help eradicate the causes of poverty. *See* 42 U.S.C. § 2790(a).

The Director of the Community Services Administration is authorized to designate community action agencies in communities in the United States, and to award these agencies grants for the purpose of carrying out community action programs. Funds are appropriated by Congress under § 221 of the Economic Opportunity Act of 1964. 42 U.S.C. § 2808.

On August 13, 1981, Congress enacted the Omnibus Budget Reconciliation Act of 1981, which effectively abolished the Community Services Administration and repealed 42 U.S.C. § 2808, under which community action programs had been funded since 1965. In place of direct federal funding of community service agencies, Congress has established a block grant program whereby federal money is granted to the states directly for their use in combating the causes of poverty.

Because the community service agency was abolished as of October 1, 1981, and because there were no more funds available to fund community action programs directly, plaintiffs will not be funded for the upcoming year. Plaintiffs seek an order of the court compelling defendants to fund their community action programs for next year, and to afford them certain rights they feel are theirs under the law. This matter is before the court on defendants' motion to dismiss.

On October 5, 1981, this Court, through the Honorable Richard D. Rogers, denied plaintiffs' motion for a temporary restraining order on the ground that plaintiffs

failed to demonstrate probable success on the merits. Judge Rogers concluded: "Plaintiffs have failed to demonstrate that the actions of defendants were probably arbitrary and capricious or in violation of the law." The court has considered the motion to dismiss, the arguments of counsel and the issues of law, and finds that defendants' motion to dismiss should be sustained.

II

This matter is before the court on a motion to dismiss. Both parties have elected to treat the motion to dismiss as one for summary judgment, in that both parties have included material outside the pleadings.

Plaintiffs argue that summary judgment is not proper in this case, and at this time, because there remain seven issues of fact to be litigated. The court finds that these are not issues of fact, but rather are conclusions of law. The court finds that there are no facts in dispute in this case, and that each of the conclusions of law proposed by plaintiffs must be decided in favor of defendants.

A. *Is this lawsuit premature?*

Congress has enacted the Omnibus Budget Reconciliation Act of 1981, which effectively abolishes the Community Services Administration as of October 1, 1981. Congress has decided to abolish the program under which community action programs are directly funded by the federal government. In place of direct funding, Congress has determined that the public would be better served by a block grant program. 42 U.S.C. § 9901. *See also,* 42 U.S.C. § 9912.

Under the new block grant program, the Secretary of Health and Human Services is authorized to make grants directly to the states. Each state will receive an annual

block grant to be used as it sees fit in its anti-poverty efforts. For fiscal year 1982, the states may choose to operate their anti-poverty programs under the block grant program, or to have the Secretary of Health and Human Services operate the community action programs under the pre-existing plan. Beginning in fiscal year 1983, and continuing into the future, all states are going to be required to operate under the block grant program.

The Governor of the State of Kansas has chosen to administer his state's anti-poverty program. This program is authorized to begin on October 1, 1981. As of that date, plaintiffs became eligible to receive funds pursuant to the block grant program. *See* 42 U.S.C. §§ 9902, 9904.

Because plaintiffs are eligible to receive money under the block grant program from the state of Kansas, they have not shown that they were directly harmed by the congressional decision to dissolve the Community Services Administration and to terminate direct funding under the Economic Opportunity Act of 1964. The court therefore finds that this lawsuit is premature and should be dismissed on that ground. Even were the suit not premature, plaintiffs must fail on the merits, however.

**B.** ***Have defendants' actions reduced the funding provided to the State of Kansas below the statutory minimum prescribed by 42 U.S.C. § 2812(a)?***

Section 2812(a), Title 42, United States Code, forbids the director of the Community Services Administration to reduce the total funding provided to any community action agency in any state below a certain minimum figure. In winding up the affairs of the Community Services Administration, the director in Washington has apparently determined that surplus funds available for Kansas community action agencies should be distributed in such a manner so as to fund completely four smaller community

action agencies, and to cut off the funding in part to the three larger community action agencies. Plaintiffs in this case are two of those three large community action agencies. Plaintiffs allege that the defendants' decision has reduced the total funding for the state below the minimum required in 42 U.S.C. § 2812(a).

The United States Congress has expressly repealed 42 U.S.C. § 2812(a). *See* 42 U.S.C. § 9912(a). This repeal became effective October 1, 1981. The Director's decision not to refund plaintiffs for fiscal year 1982 was a decision which became effective October 1, 1981. Therefore, when the Director's decision became effective, his decision was not in violation of the statutory provisions cited to this court by plaintiffs. The court does, therefore, overrule plaintiffs' objection to the motion to dismiss on this ground.

C. *Have defendants violated the statutory requirements of Rural-Urban Equity?*

In 42 U.S.C. § 2967, and again in § 2833(b), the Director of the Community Services Administration is required to distribute funds equitably between residents of rural and urban areas. Plaintiffs have reason to believe that defendants' decision to cut off funding to them may have violated these statutory requirements.

The court resolves this issue in a manner similar to the issue described just above. Sections 2967 and 2833, 42 U.S.C., were abolished by Congress and repealed effective October 1, 1981. *See* 42 U.S.C. § 9912(a). The Director's funding decision in regard to plaintiffs did not become effective until October 1, 1981, the same date upon which these statutes were repealed. Therefore, the Director's decision could not violate these statutes.

**D.** ***Plaintiffs' rights to due process.***

Plaintiffs argue that they have not been granted the due process hearing mandated by statutes and regulations and by the Constitution of the United States.

Before it was repealed by Congress, 42 U.S.C. § 2944(2) and 45 C.F.R. § 1067.2, required notice and opportunity to be heard before an application or refunding was denied. Plaintiffs argue that they were not refunded, and that no hearing was had before their refunding was denied. They also argue that their financial assistance was suspended without notice and opportunity to be heard.

The court finds no merit in either argument. Financial assistance to plaintiffs was neither suspended nor denied. Congress has instead decided to abolish the entire system. Therefore, the statutory and regulatory provisions cited to the court do not apply to this case. Even if they did, the regulatory scheme, by its own terms, does not apply in cases of reduced appropriations. 45 C.F.R. § 1067.2-.4. The decision by Congress to dismantle the entire Community Services Administration is certainly a reduction in appropriations. Therefore, plaintiffs had no statutory or regulatory right to a due process hearing.

Nevertheless, plaintiffs argue that they possess a right to a due process hearing under the Constitution of the United States. The United States Supreme Court has defined the kind of interest necessary to trigger constitutional guarantees of due process. Certain property interests are protected by procedural due process. To have a property interest in a government benefit, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . ." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972).

Plaintiffs can have no legitimate claim of entitlement to funds direct from the federal government during fiscal year 1982. Congress has chosen, effective October 1, 1981, to dismantle the entire Community Services Administration, and to stop funding directly community action agencies such as the plaintiffs. Therefore, if Congress has decided to stop funding plaintiffs, plaintiffs can have no legitimate claim of entitlement to those funds.

Plaintiffs claim, however, that they were entitled to be funded during fiscal year 1982 with funds left over from fiscal year 1981. The plaintiff agencies, in the past, were not funded from one fiscal year to another. Plaintiffs, rather, were funded on a program-year basis. A program year began in one fiscal year and ended in another fiscal year. Plaintiffs' last program year was funded by the director of this region. Plaintiffs allege that they were told they would be funded for their entire program year. That portion of plaintiffs' program year, which was in fiscal year 1981, was guaranteed to be funded through funds appropriated for fiscal year 1981. The remainder of the program year, which went through into fiscal year 1982, was "guaranteed" to be funded by fiscal year 1982 funds.

It is alleged that plaintiffs received their 1981 funding, but that the remainder of the funds for the program year, which were to come from fiscal 1982 funds, have been denied plaintiffs. Obviously, this denial is a direct result of the congressional decision to dismantle the Community Services Administration and to stop funding directly community action programs such as plaintiffs'. Plaintiffs allege that this "promise" or "understanding" between plaintiffs and the regional director give them a legitimate claim of entitlement to funding throughout the remainder of their program year.

Plaintiffs' claim of an informal agreement may indeed give rise to protected property interests. *Perry v. Sinder-*

*mann,* 408 U.S. 593 (1972). This would possibly be the case had plaintiffs' financial assistance been terminated. *MIL-KA-KO Research & Development Corp. v. Office of Economic Opportunity,* 352 F.Supp. 169, 173 (D. D.C. 1972). This is not the case, however, when Congress has chosen to dismantle the entire funding program. The dismantling of the Community Services Administration, and the decision not to directly fund community action agencies, is a disappointment of a "unilateral expectation" of a benefit, and is not entitled to the constitutionally required burden of procedural due process. Therefore, we find that there is no theory under which it may be held as a matter of law that plaintiffs' due process rights were violated.

**E.** ***Were defendants' actions an illegal impoundment of funds?***

It is alleged that defendants' refusal to use fiscal year 1981 funds for the purposes of funding plaintiffs' programs which continued into fiscal 1982 represents a violation of the United States Constitution, Article 2, § 3, and the Impoundment Control Act of 1974, 31 U.S.C. § 1400, *et seq.* Plaintiffs have apparently abandoned the contention they raised at the hearing on the temporary restraining order that § 682(e) of the Reconciliation Act which recalled unexpended funds constituted an unlawful impoundment of funds.

In the court's order of October 5, 1981, denying a temporary restraining order, Judge Rogers relied on § 682(e) of the Reconciliation Act and concluded that plaintiffs had failed to demonstrate the defendants had acted *ultra vires* by recalling unexpected funds. The court stands by that ruling. Section 682(e) authorizes the defendants to transfer certain balances if they were not expended.

Plaintiffs' lawsuit does not state a cause of action for violation of the Impoundment Control Act. The Im-

poundment Control Act of 1974 requires the executive branch of government to comply with certain reporting requirements before funds are impounded. Congress did not intend the act to create a claim upon which relief can be granted to individuals, corporations or organizations in cases where the executive has failed to report to Congress the withholding of funds.

Congress has expressly provided that lawsuits based on violations of the Impoundment Control Act must be brought by the Comptroller General. 31 U.S.C. § 1406. Even a lawsuit by the Comptroller General requires the tacit approval of Congress in each case. 31 U.S.C. § 1406.

Where a statute "limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills v. United States,* 278 U.S. 282 (1929). In the Impoundment Control Act of 1974, Congress authorizes suits by the Comptroller General for violation of the act's provisions. The court finds that this provision negates the notion of a private cause of action. Where a statute, as here, provides a particular remedy, the court is extremely reluctant to imply the existence of other remedies. *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11 (1979).

The court is convinced that plaintiffs have no cause of action under the Impoundment Control Act of 1974, and the court concludes that dismissal of this part of plaintiffs' complaint is proper. *Public Citizen v. Stockman,* 528 F.Supp. 824, 828-30 (D. D.C. 1981); *Rocky Ford Housing Authority v. United States Department of Agriculture,* 427 F.Supp. 118, 134 (D. D.C. 1977).

F. ***Did defendants' actions violate their own regulations?***

Section 1067.30-5(8), 45 C.F.R., provides that "whenever possible the grantee's fundings will coincide with the

grantee's program year." Plaintiffs argue that the failure of the Community Services Administration to fund plaintiffs for their entire program year is a violation of the Community Service Administration's own regulations.

The court has examined this regulation in full, and finds that it only states a policy. The regulations state that whenever possible, the grantee's program year should be funded in its entirety. The regulation, however, does not speak in mandatory terms. The regulation does not require funding to coincide with the grantee's program year, and we hold that no cause of action exists against the Community Services Administration if a particular grantee's fundings do not coincide with their program year.

G. *Miscellaneous objections.*

Plaintiffs argue that defendants' actions violated the statutory requirement that funds be distributed on an equitable basis, the constitutional requirement of equal protection, the statutory requirement that funds be distributed on the basis of legitimate project concerns, and the ban in the Administrative Procedure Act of all arbitrary and capricious action.

Upon close examination, this multi-headed argument resolves itself into two main contentions. First, plaintiffs are arguing that they have been denied equal protection. Second, plaintiffs argue that defendants' decision represents an arbitrary and capricious decision or otherwise an abuse of discretion.

The federal government is bound by the Fifth Amendment to the Constitution of the United States to accord to its citizens equal protection of law. This equal protection requirement is at least as strong as that which applies to the states. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). In addition, the Economic Opportunity Act of 1964 requires

the director to "assure that financial assistance under this subchapter will be distributed on an equitable basis in any community and within any state so that all significant segments of the low-income population are being served." 42 U.S.C. § 2836(8). Plaintiffs argue that defendants' decision has led to a distribution of funds which violate these requirements.

What has occurred in this case is that smaller community action agencies were funded for the fiscal year 1981 from 1981 funds. Plaintiffs were larger community action agencies. Plaintiffs were not funded on a fiscal-year basis, but rather on a program-year basis. Plaintiffs' program year began sometime in the middle of fiscal year 1981, and was scheduled to terminate sometime in the middle of fiscal year 1982. The procedure used with these large community action agencies was that the beginning of their program year was funded with funds appropriated during that fiscal year, and the end of their program year would be financed with funds appropriated for the next fiscal year. To illustrate, had the Community Services Administration not been dissolved by an act of Congress, plaintiffs would have been funded during their program year by receiving fiscal year 1981 funds for the first half of their program year and fiscal year 1982 funds for the second half of their program year.

Therefore, plaintiffs began their program year with the expectation of finishing their program year. However, Congress determined that the Community Services Administration, and its enabling legislation, should be repealed. Therefore, there would not be any fiscal year 1982 funds available for plaintiffs to use to finish their program year. There were, however, some funds remaining in the pipeline, so to speak. With these left-over or unexpended funds, the Director of the Community Services Administration, or his authorized agents, have determined

that some smaller community action agencies could be funded for an additional period of time in fiscal year 1982 with left over funds from fiscal year 1981. Plaintiffs, however, did not receive any additional funding from these unexpended 1981 funds. Plaintiffs allege that this constitutes a denial of equal protection. Plaintiffs would rather the regional director had pooled the available funds for a *pro rata* distribution to all of the community action agencies in Kansas.

While in the face of things it seems that a *pro rata* distribution would have been more fair than the procedure followed in this case, the court is unable to say that plaintiffs have been denied equal protection under the law. There is no evidence before the court that defendants' decisions were made without a rational basis.

Equal protection requires that government regulations and decisions be rationally supportable. *Dandridge v. Williams,* 397 U.S. 471, 483 (1970). The policy of distinguishing between large and small community action agencies has existed since 1975. Because community action agencies have different program years, the Community Services Administration has been able to stagger its workload in processing grant applications for those community action agencies which are funded on a program-year basis. Since 1974, the Community Services Administration has never had sufficient appropriations to be able to fund all community action agencies from the beginning of their year. Because the majority of community action agencies are "small" community action agencies whose funding is staggered based on a program year, the Community Services Administration has been able to process grant applications for most of them in advance of the end of the federal fiscal year, thus avoiding the accumulation of an unmanageable workload around September 30 and a resulting delay in funding.

The Community Services Administration did not alter their policy following Congress' decision to dissolve the administration. As of August 13, 1981, there was less than Thirty Million Dollars of unobligated funds from fiscal year 1981 remaining within the agency. Although this seems like a great amount of money, it represents approximately only eight percent of the Community Services Administration's fiscal year 1981 appropriation.

Most small community action agencies had already received funding for their full program year, which was to begin prior to August 13, 1981. Because the Community Services Administration was abolished as of October 1, 1981, and because it therefore has no appropriations for fiscal year 1982, no community action agency has received funding from fiscal 1982 funds.

The policy of the Community Services Administration since 1975 has been to divide grantee[]s who receive funds into two categories, large community action agencies and small community action agencies. Large community action agencies are those which receive more than Three Hundred Thousand Dollars annually; small community action agencies receive less than that amount. Large community action agencies generally receive funds in two installments; one installment would run from the beginning of that community action agency's program year until the end of the fiscal year on September 30, and another from the beginning of the next federal fiscal year on October 1 until the end of the community action agency's program year. This is called split-funding and results in large community action agencies having their program years funded from the appropriations for two separate federal fiscal years. By contrast, small community action agencies receive their funding in one yearly installment provided at the beginning of their program year and taken from one fiscal year's funds.

The Director of the Community Services Administration determined that it would be more equitable and less disruptive to fund all grantees according to their historical funding patterns. Of necessity, this means that the small community action agencies had received funding for their full program year which began prior to August 13, 1981, when the block grant program was enacted. To fully illuminate the distinction between small and large community action agencies, and to provide each community acction agency with an equitable *pro rata* share of fiscal year 1981 funds would have required the Community Services Administration to attempt to withdraw funds already committed to those community action agencies whose 1981 grant applications were approved and funded prior to August 13. The Director of the Community Services Administration made an administrative decision to commit the funds to the small community action agencies and to allow the funding for the larger community action agencies, like plaintiffs, to run out when the 1982 fiscal year began on October 1, 198[1]. This was strictly a judgment call, and we do not find it to be either irrational or inequitable. Because most of the community action agencies are small community action agencies, this policy enabled most community action agencies to receive twelve months of funding from fiscal year 1981 funds.

Similarly, we do not find defendants' actions to constitute arbitrary, capricious actions or an abuse of discretion, which we may scrutinize under the Administrative Procedure Act. 5 U.S.C. § 706(2)(a).

In applying the arbitrary and capricious standard of § 706(2)(a), the court must consider whether the decision was based on consideration of relevant factors and whether there has been a clear error of judgment. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974), *rehearing denied* 420 U.S. 956

(1975), *on remand* 399 F.Supp. 157 (W.D. Ark. 1975), *aff'd.* 425 U.S. 901 (1976). The court may set aside an agency action which is arbitrary and capricious or involves an abuse of discretion if the court is of the opinion that the agency action was clearly wrong. *Hughes Air Corp. v. Civil Aeronautics Board,* 482 F.2d 143 (9th Cir. 1973). The court must give great deference to decisions of an administrative agency, and may reverse such determinations only when they are clearly wrong. *Malis v. Hills,* 588 F.2d 545 (6th Cir. 1978). The court finds that defendants' decision did not constitute a clear error of judgment, and was not clearly wrong. The arbitrary and capricious standard of review does not require that the administrative agency's position be supported by substantial evidence, but only that it have a rational basis in law. *Hurley v. United States,* 575 F.2d 792, 794 (10th Cir. 1978). The court finds that defendants' decisions do indeed have a rational basis in law.

III

Therefore, the court finds that defendants' motion to dismiss should be sustained. Inasmuch as it appears from the record that plaintiffs are no longer represented by counsel, the court will direct the clerk of this court to forward a copy of this Memorandum and Order directly to plaintiff Wallace Rogers, 1011 South Elm, Pittsburg, Kansas, and to the two organizational plaintiffs if their address can be discovered.

IT IS BY THE COURT THEREFORE ORDERED that defendants' motion to dismiss is hereby granted. IT IS FURTHER ORDERED that a copy of this Memorandum and Order be forwarded individually to each plaintiff in this action, and copies to counsel for defendants.

DATED: This 24th day of August, 1982, at Kansas City, Kansas.

/s/ Dale E. Saffel

DALE E. SAFFEL
United States District Judge

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